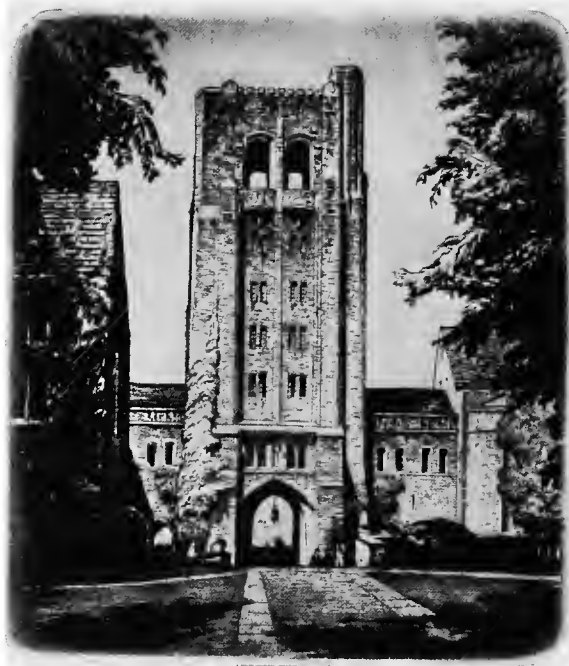


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A DIGEST
OF
THE LAW OF ENGLAND
WITH REFERENCE TO
THE CONFLICT OF LAWS.

THIRD EDITION.

BY

A. V. DICEY, K.C., HON. D.C.L.,

OF THE INNER TEMPLE; FORMERLY VINERIAN PROFESSOR OF ENGLISH LAW IN THE UNIVERSITY OF OXFORD; FELLOW OF ALL SOULS COLLEGE; HON. FELLOW OF TRINITY COLLEGE AND BALLIOL COLLEGE, OXFORD; HON. LL.D., CAMBRIDGE, GLASGOW AND EDINBURGH.

AND

A. BERRIEDALE KEITH, D.C.L., D.LITT.,

OF THE INNER TEMPLE, BARRISTER-AT-LAW; AND OF THE SCOTTISH BAR
REGIUS PROFESSOR OF SANSKRIT AND COMPARATIVE PHILOLOGY IN THE
UNIVERSITY OF EDINBURGH; FORMERLY OF THE COLONIAL OFFICE.

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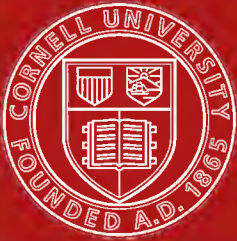
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To
THE RIGHT HON. ARTHUR COHEN
ONE OF HIS MAJESTY'S COUNSEL
WHOSE MASTERY OF LEGAL PRINCIPLES
WAS SURPASSED ONLY BY
THE KINDNESS WITH WHICH HIS LEARNING AND EXPERIENCE
WERE PLACED AT THE SERVICE OF
HIS FRIENDS



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PREFACE

TO THIRD EDITION.

NEARLY thirteen years have elapsed since the publication of the Second Edition of this Work. It may, therefore, be worth while to state the exact end proposed to themselves by the Editors of this Third Edition, and to indicate some of the causes which have made the attainment of that object a matter of difficulty.

The sole aim of the Editors has been to render the Third Edition of this Book as accurate an exposition of the law of England with regard to the conflict of laws as it stood in 1921, as was the Second Edition with regard to the law on the same topic in 1908. Hence the Editors have rigidly adhered to the limits of treatment imposed by the Author when preparing the First Edition of 1896. They have treated the conflict of laws solely from the point of view of the law of England as it at present stands, and have not attempted to trace, except for the purpose of illustration, the growth of this branch of English law. They have not attempted to defend the English rules as to the conflict of laws as being always in accordance with the dictates of logic or of expediency, and they have borne in mind that the commentator or expositor of a law has no need to play the part of an apologist or reformer. They have made no effort, save incidentally, to state the rules as to the conflict of laws existing in Continental countries.

The chief difficulties which the Editors have had to face in their task has been the embodiment in the Work of the result of the Acts of Parliament and Rules of the Supreme Court issued since the appearance of the Second Edition. The defects inseparable from Parliamentary legislation under existing conditions are especially prominent in the case of matters affecting the conflict of laws. Such questions are often ignored even by draftsmen, and the changes made in a Bill in the course of its passage through Parliament are normally motivated by other than legal considerations. Moreover, in the interpretation of statutory enactments the Courts have prescribed to themselves rules of strict interpretation which leave the Judges little scope for the exercise of that power of developing and expounding principles which so markedly distinguishes the judicial treatment of questions of Common Law and Equity. A further difficulty is presented by the fact that various circumstances, among them the War, have rendered comparatively few the cases in which doubtful points under such Acts as the Companies (Consolidation) Act, 1908, the Bankruptcy Act, 1914, or the British Nationality and Status of Aliens Act, 1914, have received judicial interpretation. While, again, full information as to the purposes for which Bills were introduced is obtainable from the records of the proceedings in Parliament upon them, the Courts rightly refuse to treat such explanations as throwing any light on the legal interpretation of the enactment as finally assented to by the Crown. Nor are Rules of the Supreme Court, though made by the Judges themselves, free from difficulty of construction, as may be seen from the changes found necessary in 1921 in the Rules issued in 1920 regarding the service of writs out of the jurisdiction.

Hence the Editors of this Edition have more than once felt serious doubt as to the right manner of dealing with new enactments affecting the Rules in this Book. They might, in each case in which a statute deals with matters falling under the conflict of laws, have adopted the words of the statute, and in some instances, as in the chapter on Bankruptcy, this course has been in large measure followed. But in other cases, especially in regard to the British Nationality and Status of Aliens Act, 1914, it has been necessary, at the risk of error, to present the reader with a statement of the law, which is an interpretation and elucidation of the Act and not a reproduction of its terms.

By omitting Note 8 of the Appendix to the Second Edition, dealing with "Limits of Taxation in respect of Death Duties and Duties of Income Tax," it has been found possible to spare space for a new Note 9 on "Jurisdiction in respect of Alien Enemies," a topic on which much light was thrown during the War, and for Notes 13—15, dealing with certain difficult problems of divorce and nullity jurisdiction. The delay in passing the Law of Property Bill has rendered it impossible for us to take note of the effects of that measure on our subject, but these, to judge from the latest form of the Bill, will not be far-reaching. References to Irish conditions are necessarily based on the situation established by the Government of Ireland Act, 1920.

In conclusion, the Editors desire to express their gratitude for the willing help they have received from several friends, including Professor W. M. GELDART, now Vinerian Professor of English Law at Oxford, Mr. J. G. ARCHIBALD, Lecturer on Private International

Law in the University of Oxford, Sir JOHN RANKINE, Professor of Scots Law in the University of Edinburgh, Mr. G. DUNCAN, Lecturer on International Law in the University of Aberdeen and joint Author of *The Principles of Civil Jurisdiction as applied in the Law of Scotland*, and Mr. EDWARD T. BALDWIN, Author of the *Law of Bankruptcy*.

A. V. DICEY.

A. BERRIEDALE KEITH.

December, 1921.

PREFACE

TO SECOND EDITION.

THIS treatise was published in 1896. My aim in this Second Edition is to bring the Work up to date, and to embody in it the effect of the numerous and sometimes very important cases bearing on the Conflict of Laws which have been decided by our Courts during the last twelve years. Hence I have dwelt upon some questions which were either not considered at all or were but slightly touched upon in the First Edition. I have, for example, tried to determine how far English Courts accept the doctrine of the *renvoi*, what is the legal effect of the De Nicols cases, and what may be the extra-territorial validity of Indian or Colonial divorces of persons not domiciled in the country where the divorce is granted.

The present Edition, however, though it deals with some topics to which little or no reference is made in the First Edition of this treatise, is substantially the same Work as the book published in 1896. One change alone requires to be noted. This alteration is the omission of the notes of American cases furnished by the industry and knowledge of Professor J. B. Moore. The omission is due to two causes: The first is that while American authorities are comparatively little used by English lawyers, it is, as I have found from experience, impossible in a work mainly intended for English readers to introduce a collection of American cases sufficiently complete to meet the wants of American lawyers: The second cause is that the publication since 1896 of Professor Beale's admirable *Selection of Cases on the Conflict of Laws*—a book

which ought to be found in every law library—supplies an account of every leading case, whether American or English, which a practising lawyer will wish to consult.

It is a pleasure to acknowledge the help I have received from various friends in the preparation of this Edition. Mr. ARTHUR COHEN's suggestions have been numerous and important. In every passage of my Work which refers to the subject of administration or succession I have had the advantage of the criticism of Mr. ELGOOD; it has greatly aided me in introducing into my Digest changes of language necessitated by the passing of the Land Transfer Act, 1897. Mr. A. B. KEITH's extensive knowledge of Colonial law has enabled me to express a more decided opinion than I could otherwise have formed on the extra-territorial effect of Indian and of Colonial divorces. My colleague Mr. GELDART has given me great assistance in the attempt to exhibit in the form of rules the principles which govern the execution of powers of appointment by will in cases connected with the Conflict of Laws.

A. V. DICEY.

1908.

FROM THE
PREFACE TO FIRST EDITION.

My aim in this book is to apply to the whole field of private international law the method of treatment already applied to a large part thereof in my book on the law of domicil. In the following pages the principles of private international law recognised by English Courts—or, to use an exactly equivalent expression, the principles adhered to by English judges when dealing with the conflict of laws—are treated as a branch of the law of England: these principles are exhibited in the form of systematically arranged Rules and Exceptions, and each of these Rules and Exceptions is, when necessary, elucidated by comment and illustrations. Hence this treatise has a twofold character. It is, or rather it contains, a second and carefully corrected edition of *The Law of Domicil as a Branch of the Law of England*. It is also a complete digest of and commentary on the law of England with reference to the conflict of laws.

* * * * *

That the attempt to form a digest of private international law, as administered by the English Courts, should result in anything like complete success, is more than I can hope. This branch of law has been created within little more than a century by a series of judicial decisions, and is now, to the great benefit of the public, year by year extended and developed through the legislative activity of our judges. This development has not yet reached its term. No one therefore can finally sum up its results. That even the endeavour to form a digest of private international law should be possible, is due to the labours of my predecessors. This field of law has been fully explored by Story, Westlake, Foote, Wharton, and Nelson. The works of these authors have, during the composition of this treatise, never been

long out of my hands. I have also sought the guidance, when I could obtain it, of English writers who have dealt either directly or indirectly with special departments of private international law; thus on the difficult subject of foreign judgments I have been greatly aided by Mr. Piggott's ingenious and exhaustive monograph: nor have I neglected to consult foreign jurists, such as Savigny, Bar, and Foelix, who, even when they disagree with the conclusions arrived at by English judges, often throw considerable light, if it be only by way of contrast, on the doctrines maintained in England with regard to the conflict of laws. To no single English writer, let me add, am I more deeply indebted than to Mr. Westlake. The soundness and thoroughness of his workmanship can be appreciated only by readers who, like myself, have made an elaborate study of his *Treatise on Private International Law*. There will be found, indeed, in the following pages, several expressions of dissent from his conclusions. Such criticism, however, so far from being the result of any underestimate of is in reality a tribute to his merits. Whenever it was my misfortune to disagree on any material matter with an opinion of Mr. Westlake, it was due to my readers to state that my own view lacked the support to be derived from his concurrence, and due to myself to explain, and if possible to justify, my dissent from conclusions which carry the weight of his authority.

It is a pleasure, no less than a duty, to return my heartfelt thanks to the many friends who have aided me in the production of this book.

From my friend Mr. Arthur Cohen I have received help which is in the strictest sense invaluable. His advice has often removed difficulties with which I should not myself have been able to cope, and any novelty which may be found in the book is due in great measure to his ingenious and fertile suggestions. To my friend and colleague Professor Holland, also, I am under intellectual obligations of a special character. My whole conception of private international law has been influenced by views expressed by him, not only in his writings but in his conversation. There is more than one fundamental idea embodied in this work of which, owing to our constant intercommunication of thought, I should find it hard to say whether it originated in my own mind or was suggested to me by my friend. My special thanks are also due

to Mr. John M. Gover, who has added to this treatise a carefully prepared index, and to the many officials and others who have given me information on matters of detail where my own knowledge was at fault. On questions connected with grants of probate, or letters of administration, I have enjoyed the great advantage of consulting Mr. Musgrave, of the Probate Registry, whilst my friend Mr. Highmore, of the Inland Revenue Office, and Mr. Norman, the author of the admirable *Digest of the Death Duties*, have spared no pains to explain to me details with regard to the incidence of the Death Duties and the Duties of Income Tax. But for every statement in this work I alone am responsible. Whatever errors it contains are wholly my own. Whatever merits it may exhibit are due in no small degree to the authors whose works I have studied, and whose conclusions I have reproduced, and to the many friends from whom I have received help and encouragement.

A. V. DICEY.

1896.

CONTENTS.

	PAGE
LIST OF AUTHORITIES.....	xxi
LIST OF CASES.....	xxiii
TABLE OF PRINCIPLES AND RULES.....	xli
INTRODUCTION.....	1
I. NATURE OF THE SUBJECT	1
II. METHOD OF TREATMENT	16
III. GENERAL PRINCIPLES.....	23
I. Rights enforced by English Courts	23
II. Rights not enforced by English Courts	34
III. Jurisdiction based on Power to give Effective Judgment	40
IV. Jurisdiction based on Submission	44
V. Nature of Right determined by Law under which acquired	59
VI. Legal Effect of Transactions determined by Law contemplated by Parties thereto	60

BOOK I.

PRELIMINARY MATTERS.		66
CHAPTER		RULES
I.	INTERPRETATION OF TERMS	67
	I. General Definitions..	67
	II. Application of Term "Law of Country"	79
II.	DOMICIL	1—19 83
	(A) Domicil of Natural Persons	1—18 83
	I. Nature of Domicil	1—4 83
	II. Acquisition and Change of Domicil	5—11 104
	Domicil of Independent Per- sons	5—8 104
	Domicil of Dependent Persons	9—11 126
	III. Ascertainment of Domicil	12—18 139
	(B) Domicil of Legal Persons or Corpora- tions	19 163

CHAPTER	RULES	PAGE
III. BRITISH NATIONALITY	20—51	167
(A) Definitions	20, 21	167
(B) Acquisition of British Nationality ..	22—37	169
(C) Loss of British Nationality	38—47	197
(D) Resumption of British Nationality ..	48—50	205
(E) Status of Aliens	51	207

BOOK II.

JURISDICTION. 212

PART I.

JURISDICTION OF THE HIGH COURT.

IV. GENERAL RULES AS TO JURISDICTION	52—58	215
V. JURISDICTION IN ACTIONS <i>in personam</i>	59, 60	241
VI. ADMIRALTY JURISDICTION <i>in rem</i>	61	280
VII. JURISDICTION IN RESPECT OF DIVORCE—DECLARATION OF NULLITY OF MARRIAGE—AND DECLARATION OF LEGITIMACY	62—66	285
I. Divorce	62, 63	285
II. Judicial Separation and Restitution of Conjugal Rights ..	64	296
III. Declaration of Nullity of Marriage	65	300
IV. Declaration of Legitimacy	66	305
VIII. JURISDICTION IN BANKRUPTCY AND IN REGARD TO WINDING-UP OF COMPANIES	67—74	312
I. Bankruptcy	67—72	312
II. Winding-up of Companies	73, 74	329
IX. JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION	75—78	335
X. STAYING ACTION— <i>Lis Alibi Pendens</i>	79	355
XI. EXTRA-TERRITORIAL EFFECT OF ENGLISH JUDGMENT; ENGLISH BANKRUPTCY; ENGLISH GRANT OF ADMINISTRATION	80—90	362
(A) English Judgment	80	362
(B) English Bankruptcy and Winding-up of Companies	81—83	364
(C) English Grant of Administration..	84—90	374

PART II.

JURISDICTION OF FOREIGN COURTS.

CHAPTER	RULES	PAGE
XII. GENERAL RULES AS TO JURISDICTION	91—94	386
XIII. JURISDICTION IN ACTIONS <i>in personam</i>	95, 96	393
XIV. JURISDICTION IN ACTIONS <i>in rem</i>	97	413
XV. JURISDICTION IN MATTERS OF DIVORCE AND AS REGARDS VALIDITY OF MARRIAGE	98—100	416
I. Divorce	98, 99	416
II. Declaration of Nullity of Marriage	100	424
XVI. JURISDICTION IN MATTERS OF ADMINISTRA- TION AND SUCCESSION	101, 102	427
XVII. EFFECT OF FOREIGN JUDGMENTS IN ENGLAND	103—121	429
I. General	103—113	429
II. Particular Kinds of Judgments.	114—121	448
(A) Judgment <i>in personam</i> ..	114—117	448
(B) Judgment <i>in rem</i>	118, 119	465
(C) Judgment, or Sentence, of Divorce	120	468
(D) Judgment in Matters of Succession	121	469
XVIII. EFFECT IN ENGLAND OF FOREIGN BANK- RUPTCY; FOREIGN GRANT OF ADMINIS- TRATION	122—135	471
(A) Foreign Bankruptcy	122—128	471
(B) Foreign Grant of Administration.	129—135	485

BOOK III.

CHOICE OF LAW. 498

XIX. STATUS	136—138	500
XX. STATUS OF CORPORATIONS	139, 140	511
XXI. FAMILY RELATIONS	141—148	514
(A) Husband and Wife	141	514
(B) Parent and Child	142, 143	514
(C) Guardian and Ward	144	517
(D) Legitimacy ..	145, 146	520
(E) Lunatic and Curator, or Committee.	147, 148	533

CHAPTER	RULES	PAGE
XXII. NATURE OF PROPERTY	149	539
XXIII. IMMOVABLES	150	542
XXIV. MOVABLES	151—154	560
XXV. CONTRACTS—GENERAL RULES	155—162	572
(A) Preliminary	155—157	572
(B) Validity of Contract	158—160	577
(C) The Interpretation and Obligation of Contract	161	602
(D) Discharge of a Contract	162	615
XXVI. PARTICULAR CONTRACTS	163—181	618
(A) Contracts with regard to Immove- ables	163	618
(B) Contracts with regard to Movables..	164	620
(C) Contract of Affreightment	165, 166	621
(D) Contract for Through Carriage of Person or Goods	167	626
(E) Average Adjustment	168—170	629
(F) Provisions of Bills of Exchange Act, 1882, as to Conflict of Laws	171—175	632
(G) Negotiable Instruments Generally ..	176, 177	648
(H) Interest	178	654
(I) Contracts through Agents	179, 180	656
(J) Damages for Breach of Contract as affected by Rate of Interest...	181	659
XXVII. MARRIAGE	182—186	661
(A) Validity of Marriage	182, 183	661
(B) Assignment of Movables in Conse- quence of Marriage.....	184—186	685
XXVIII. TORTS	187—189	694,
XXIX. ADMINISTRATION IN BANKRUPTCY	190	706
XXX. ADMINISTRATION AND DISTRIBUTION OF DE- CEASED'S MOVABLES	191, 192	709
(A) Administration	191	709
(B) Distribution	192	712
XXXI. SUCCESSION TO MOVABLES	193—202	716
(A) Intestate Succession	193	716
(B) Testamentary Succession	194—197	719
(C) Exercise of Power by Will	198—202	740
XXXII. PROCEDURE	203	761

APPENDIX.

NOTE	PAGE
1. Meaning of "Law of a Country" and the Doctrine of the <i>Renvoi</i>	771
2. Law governing Acts done in Uncivilised Countries	781
3. Case of <i>Kaufman v. Gerson</i>	784
4. Decreasing Influence of the <i>Lex situs</i>	786
5. Preference of English Courts for <i>Lex loci contractus</i>	787
6. Definition of "Domicil"	789
7. Common Law View of English Nationality	799
8. Interpretation of the British Nationality and Status of Aliens Act, 1914, s. 1	804
9. Jurisdiction in respect of Alien Enemies	809
10. Service of Writ out of England	813
11. List of Admiralty Claims	815
12. Theories of Divorce	823
13. Jurisdiction of the High Court in the case of a Marriage celebrated in England either (1) to grant Divorce on the Petition of a Wife whose Husband is not domiciled in England, or (2) to pronounce such a Marriage invalid though neither Party is domiciled in England	826
14. Extension of Divorce and Nullity Jurisdiction—The Matrimonial Causes Bill, 1921	835
15. Cases of <i>Chetti v. Chetti</i> and <i>Ex parte Mir-Anwaruddin</i>	839
16. Effect of Foreign Divorce on English Marriage	841
17. Divorces under the Indian Divorce Act, &c.	845
18. The Theoretical Basis of the Rules as to the Extra-territorial Effect of a Discharge in Bankruptcy	847
19. Legitimation	849
20. Law governing Contracts with regard to Immovables	851
21. The Wills Act, 1861	856
22. What is the Law determining the Essential Validity of a Contract?	857
23. The Case of <i>Ogden v. Ogden</i>	865
24. The Case of <i>Ewing v. Orr Ewing</i>	867
25. Questions where Deceased leaves Property in different Countries	868

†

INDEX	879
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LIST OF AUTHORITIES.

- ANSON—Principles of the English Law of Contract, 15th ed.
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¹ The references are to W. Guthrie's translation of Savigny's treatise, which forms the eighth volume of his *System des heutigen Römischen Rechts*. The sections referred to are those of the original work. The pages are the pages of the translation.

LIST OF CASES.

A.

- A. v. B.*, 300.
Abbott v. Abbott, 766.
Abdallah v. Rickards, 147.
Abd-ul-Messih v. Farra, 93, 505, 713, 719, 782, 797.
Aberdeen Arctic Co. v. Sutter, 670, 699, 700.
Abouloff v. Oppenheimer, 30, 433, 434, 435, 437.
Abram v. Cunningham, 444.
Acehal v. Levy, 765.
Actieselskabet Dampskib "Hercules" v. Grand Trunk Pacific Ry., 163.
Adam, In re, 789.
——— *v. British & Foreign Steamship Co.*, 248.
Adams v. Clutterbuck, 544, 545, 550, 555.
Adams v. G. W. Ry. Co., 164.
Addison v. Row, 700.
Aeneas Macdonald's Case, 800.
Aganoor's Trust, In re, 713, 718, 719, 769.
Agnese, In Goods of, 344.
Agnew v. Usher, 255, 256, 257, 258.
Aikman v. Aikman, 121, 141.
Aitchison v. Dixon, 102, 143.
Aksionairnoye Obschestvo A. M. Luther v. J. Sagor & Co., 36, 216, 217, 562, 595, 784.
Alcinous v. Nigreu, 234.
Alcock v. Smith, 57, 59, 368, 414, 415, 465, 561, 564, 565, 566, 567, 620, 634.
Alexander, In Goods of, 744, 745, 746, 748, 749, 753.
Alexander & Co. v. Valentine & Sons, 266.
Alfred Noble, The, 433.
Alison's Trusts, Re, 667, 677.
Alivon v. Furnival, 444, 473.
Allan's Trustees, 555.
Allardice v. Onslow, 796.
Allen v. Anderson, 540, 873, 874, 876
——— *v. Kemble*, 617, 634, 639, 768, 788.
Allhusen v. Malgarejo, 56.
Alliance Bank of Simla v. Carey, 247, 767.
Allison v. Independent Press Cable Association of Australasia, 245.
Almosnino, In Goods of, 547.
Alves v. Hodgson, 583, 585.
Aly Khan, In Goods of Dost, 486, 719.
Amalia, The, 702.
American Surety Co. v. Wrightson, 766.
——— *Thread Co. v. Joyce*, 166.
Amerika, The, 819.
Anderson, In re, 364, 473, 474, 476, 477.
——— *v. Caunter*, 493.
——— *v. Laneuville*, 59, 119, 780.
Andoni, The, 704.
Andrews v. Andrews, In re D'Angibau, 742, 743.
Andros, In re, 524, 528, 531, 850.
Aneroid, The, 822.
Anger v. Vasmier, 265.
Anghinelli v. Anghinelli, 135, 296.
Angus v. Angus, 229.
Annette, The, 216, 816.
Anon. (1721 or 1723), 9 Mod. 66..871, 873.
Anon. (1825), 3 Bing. 193..655.
Anstruther v. Adair, 686, 687, 689.
——— *v. Chalmer*, 732.
Antelope, The, 230.
Antoine v. Morshead, 234.
Anwaruddin, Ex parte Mir, 289, 416, 500, 684, 839, 840.
Araya v. Coghill, 473.
Ardaseer Cureetjee v. Perozeboye, 290.
Arglasse v. Muschamp, 229.
Armani v. Castrique, 849.
Armitage v. Armitage, 662, 685, 783.
——— *v. Attorney-General*, 235, 236, 238, 308, 311, 423, 771.
Armstrong v. Stokes, 658, 659.
Armytage v. Armytage, 134, 135, 296, 297, 298, 299, 505, 827.
Arnott v. Groom, 96, 97, 117, 127, 157.
——— *v. Redfern*, 614, 654, 655.
Arthur v. Hughes, 493.
Artola Hermanos, In re, 325, 327, 365, 474, 475.
Arum, The, 696, 704.
Atkins v. Smith, 374, 375, 376, 379.
Atkinson v. Anderson, 551, 850.
——— *v. Bury St. Edmunds Recruiting Officer*, 202.
Attia v. Seed, In re Beck, 269.
Attorney-General v. Alexander, 163, 165.
——— *v. Bouwens*, 339, 343, 344, 345, 346, 349.
——— *v. Coote*, 101.

- Attorney-General *v.* Dimond, 344, 378, 379.
 ——— *v.* Higgins, 343, 348.
 ——— *v.* Hope, 339, 340, 343, 344, 346, 348, 349, 350, 351.
 ——— *v.* Kent, 112, 113, 144, 157, 218, 792.
 ——— *v.* Kwok-A-Sing, 31.
 ——— *v.* Mill, 548.
 ——— *v.* Napier, 158.
 ——— *v.* Pottinger, 84, 115, 156, 159.
 ——— *v.* Pratt, 343, 349.
 ——— *v.* Rowe, 83, 92, 156, 794.
 ——— *v.* Stewart, 548.
 ——— *v.* Sudeley, 345.
 ——— *for* Canada *v.* Schulze, 230, 233, 453.
 Atwood *v.* Sellar, 615.
 August, The, 588, 602, 603, 608, 622, 623, 625, 626.
 Austria (Emperor of) *v.* Day, 230, 234.
 Ayerst *v.* Jenkins, 34, 36.
 B.
 Bacon *v.* Bacon, 178, 181.
 Badcock *v.* Cumberland Gap Co., 250.
 Badische Anilin und Soda Fabrik *v.* Basle Chemical Works, Bindschedler, 267.
 Bahia, The, 818, 821.
 Baillie *v.* Baillie, 358, 377.
 Bain *v.* Whitehaven, &c. Railway Co., 766.
 Baines, *In re*, 552, 781.
 Baker's Settlement Trusts, *In re* (1908), 745, 756, 757.
 Baker, *In re* (1871), 536.
 ——— *v.* Baker, 824.
 Balfour *v.* Scott, 547.
 Ballantine *v.* Golding, 478.
 Banco de Portugal *v.* Waddell, 367, 368.
 Bank of Africa *v.* Cohen, 543, 544, 553, 585.
 Bank of Australasia *v.* Harding, 394, 404, 406, 445, 446, 455.
 Bank of Australasia *v.* Nias, 394, 405, 406, 434, 444, 445, 455.
 Bank of England, *Ex parte*, 455.
 Bank of Montreal *v.* Exhibits and Trading Co., Ltd., 638.
 Bank of Scotland *v.* Cuthbert, 686.
 Bankes, *In re*, 577, 579, 588, 686, 687.
 Bankes' Settlement, *In re*, 872.
 Bankruptcy Notice, *In re* A, 458.
 Barber *v.* Lamb, 456, 457.
 Barber *v.* Mexican Land Co., 761.
 Baring *v.* Ashburton, 731.
 Barkworth *v.* Barkworth, 420, 844.
 Barlow *v.* Barlow, 293.
 Barlow's Will, *In re*, 536.
 Barnard, *In re*, 608, 688.
 Barne, *Ex parte*, 158, 260, 322.
 Barnes *v.* Vincent, 744.
 Barnett's Trusts, *In re*, 717, 718.
 Barretto *v.* Young, 750, 751, 752, 753.
 Barry and Others *v.* Van den Hurk, 602, 659, 660.
 Bartley *v.* Hodges, 477, 480, 483.
 Bateman *v.* Bateman, 298.
 ——— *v.* Service, 612.
 Bater *v.* Bater, 303, 416, 417, 418, 419, 424, 437, 438, 825, 843, 844.
 Batthyany *v.* Walford, 703, 704.
 Battye's Trustee *v.* Battye, 688.
 Bawtree *v.* Great North-Western Central Railway, 226, 230, 268.
 Bazett *v.* Meyer, 598.
 Beamish *v.* Beamish, 670.
 Beattie *v.* Beattie, 677.
 Beaumont, *In re*, 75, 127, 128, 129, 130, 133.
 Beavan *v.* Hastings, 493, 495.
 Beaver *v.* Master in Equity of Victoria, 345.
 Bechuanaland Exploration Co. *v.* London Trading Bank, 648, 652, 653.
 Beck, *In re*, 269.
 Beckford *v.* Kemble, 229.
 ——— *v.* Wade, 548, 557, 558.
 Becquet *v.* McCarthy, 57, 397, 398, 408.
 Beechgrove Steamship Co. *v.* Aktieselskabet Fjord of Kristiania, 704.
 Belfast Shipowners' Co., *In re*, 368, 373.
 Belgenland, The, 701.
 Bell *v.* Kennedy, 86, 91, 98, 109, 110, 111, 112, 113, 121, 122, 125, 143, 144, 795.
 Bempde *v.* Johnstone, 140, 143, 152.
 Benham *v.* Mornington, 584.
 Bertin *v.* Bertin, 827.
 Beta, The, 248.
 Bethell, *In re*, 31, 289, 781, 783.
 ——— *v.* Hildyard, 31, 289, 781, 783.
 Betts, *In re*, 327.
 Beyfus *v.* Lawley, 759.
 Bianchi, *In re*, 486, 488.
 Biggs *v.* Lawrence, 597, 599, 862.
 Birkley *v.* Presgrave, 629.
 Birtwhistle *v.* Vardill, 34, 77, 522, 528, 529, 531, 544, 549, 551, 787, 851.
 Black Point Syndicate *v.* Eastern Concessions, Ltd., 228.
 Blackburn, Petr., 708.
 Blackwood *v.* The Queen, 377.
 Blad *v.* Bamfield, 703.
 Blad's Case, 703.
 Blain, *Ex parte*, 28, 315, 317.
 Blake *v.* Blake, 225.
 ——— *v.* Smith, 433.
 Bleckley, *In re*, 531.
 Blithman, *In re*, 474.
 Blexam *v.* Favre, 208, 726, 729.
 Blythe *v.* Ayres (Am.), 532.
 Board *v.* Board, 416.
 Bodily *v.* Bellamy, 36, 655.
 Boe *v.* Anderson, 723.
 Boissière *v.* Brockner, 403.
 Bold Buccleugh, The, 283, 822.

- Bolivia Exploration Syndicate, *In re*, 218, 221.
 Bolton, *In re*, 473.
 Bombay and Persia Steam Navigation Co. v. Maclay, 215.
 Bonacina, *In re*, 60, 588, 592, 593.
 Bonanza Creek Gold Mining Co. v. The King, 511.
 Bonaparte v. Bonaparte, 418, 436, 438.
 Bond, *In re*, 325.
 — v. Graham, 380, 485, 493, 494.
 Bonnefoi, *In re*, 354, 356, 486, 715.
 Booth v. Leycester, 229, 455.
 Borjesson v. Carlberg, 280, 281, 433.
 Boucher v. Lawson, 597.
 Bouchet v. Tullege, 767.
 Bourgogne, La (Compagnie Générale Transatlantique v. Law), 163, 249.
 Bourgoise, *In re*, 179, 520, 781.
 Bourne v. Keane, 725.
 Boussmaker, *Ex parte*, 811.
 Bowes, *In re*, 119, 120, 777, 780.
 Bowles v. Orr, 433.
 Boyes v. Bedale, 507, 850.
 Boyle v. Sacker, 235, 237.
 Boyse, *In re*, 358, 377.
 — v. Colclough, 223, 391.
 Bow, McLachlan & Co. v. Camosun (Ship), 816.
 Bozzelli's Settlement, *In re*, 522, 661, 664, 676, 678, 681, 866.
 Bradford v. Young, 61, 97, 112, 140, 142, 143, 145, 732.
 Bradlaugh v. De Rin, 634, 641.
 — v. Newdigate, 589.
 Brandon, *Ex parte*, 317.
 Branford v. Branford, 824.
 Branley v. S. E. Ry. Co., 626, 628.
 Breakey v. Breakey (Can.), 670.
 Bremer v. Freeman, 119, 120, 159, 352, 721, 734, 735, 736, 772, 773, 774, 780.
 Brentano, *In re*, Estate of Von, 375, 542, 551.
 Bridger, *In re*, 736.
 Brieseman, In Goods of, 486, 487.
 Briggs v. Briggs, 113, 417.
 Brinkley v. Attorney-General, 31, 286, 289, 308, 309, 583, 585, 781, 783.
 Bristol Athenæum, *In re*, 331.
 Bristow v. Sequeville, 575, 583, 585, 637, 768.
 British Linen Co. v. Drummond, 767.
 — South Africa Co. v. Companhia de Moçambique, 223, 224, 225, 391, 695.
 British South Africa Co. v. De Beers Consolidated Mines, 228, 553, 572, 602.
 British Wagon Co. v. Gray, 237, 272, 405.
 Broad, *In re*, 742.
 — v. Perkins, 236.
 Broadmayne, The, 215, 237, 281.
 Brodie v. Barry, 869, 870, 873, 876.
 Brook v. Brook, 34, 510, 573, 661, 665, 678, 679, 680, 681, 831, 866.
 Brookes v. Harrison, 571.
 Brooks v. Elkins, 647.
 Brown, *In re*, 538.
 Brown's Trust, *In re*, 520.
 Brown v. Brown, 296, 299.
 — v. Collins, 520.
 — v. Gracey, 789.
 — v. Gregson, 619, 875, 878.
 — v. Lynch (Am.), 133.
 — v. Smith, 158.
 — v. Thornton, 766.
 — Séquard, In the Goods of, 198, 772, 774, 780.
 Browne v. Bailey, 576.
 Bruce, *Re*, 197.
 — v. Bruce, 140, 143, 716, 796.
 Brunel v. Brunel, 117, 143, 147.
 Brunswick (Duke of) v. King of Hanover, 216, 218, 239.
 Buchanan v. Rucker, 440.
 Buenos Ayres Co. v. Northern Railway Co., 225.
 Buggin v. Bennett, 236.
 Bulkley's Case, 661.
 Bullen Smith, *In re*, 97, 145.
 Bullock v. Caird, 764.
 Bunbury v. Bunbury, 229.
 Burbidge, *In re*, 534, 536.
 Burke, *In re*, King v. Terry, 474.
 Burland's Trade Mark, *In re*, 253, 266.
 Burn v. Cole, 376.
 Burnand v. Rodocanachi, 766.
 Burrows v. Jemino, 446, 478, 617, 634, 639, 643.
 Burt v. Burt, 665.
 Burton v. Fisher, 150.
 Busfield, *In re*, 250, 251, 252, 352.
 Butler v. Freeman, 678.
 Byam v. Byam, 686, 687.

C.

- C. D. v. A. B., 418.
 Calcutta Jute Co. v. Nicholson, 163.
 Caliph, The, 284.
 Call v. Oppenheim, 253.
 Callendar v. Ditttrich, 456.
 Callender v. Colonial Secretary of Lagos, 366.
 Calvin's Case, 167, 170, 172, 181, 184, 801.
 Cammell v. Sewell, 57, 368, 414, 434, 465, 466, 561, 562, 564, 570, 620.
 Campbell, *In re*, 352.
 — v. Beaufoy, 721, 724.
 — v. Campbell, 731.
 — v. — (Sc.), 661.
 — v. Dent, 618, 619, 620, 852.
 — v. Hall, 184.
 — v. Sandford, 731.
 — v. Stein, 767.
 Canadian Pacific Railway Co. v. Parent, 698.
 Canterbury v. Attorney-General, 215.
 — (Mayor of) v. Wyburn, 548.
 Cap Blanco, The, 818.
 Capdevielle, *In re*, 99, 100, 117, 143.
 Cardross's Settlement, *In re*, 743.

- Carl Johan, The, 701.
 Carlton v. Carlton, 726.
 Carney v. Plimmer, 575.
 Carr's Trusts, *In re*, 536.
 Carr v. Francis, Times & Co., 413, 694, 696.
 Carrick v. Hancock, 243, 393, 400.
 Carrington v. Roots, 257.
 Carron Iron Co. v. Maclaren, 165, 234, 244, 358, 360, 377.
 Carswell v. Carswell, 844.
 Carter and Crost's Case, 485, 486.
 Carter v. Hungerford, 358.
 ——— v. Silber, 686.
 Carteret v. Petty, 229.
 Casdagli v. Casdagli, 88, 93, 109, 116, 160, 291, 782, 797.
 Casey v. Arnott, 258.
 Cash v. Kennion, 614, 660.
 Cass v. Cass, 423.
 Castrique v. Behrens, 455.
 ——— v. Imrie, 46, 57, 60, 280, 283, 368, 378, 413, 414, 430, 431, 436, 438, 439, 442, 444, 446, 447, 465, 466, 561, 563, 570, 620.
 Catherwood v. Caslon, 670, 682.
 Catterall v. Catterall, 670, 783.
 Celia (Owners of) v. Volturmo (Owners of), ([1921] 2 A. C. 544): *see* Volturmo, The.
 Central Sugar Factories of Brazil, *In re*, 372, 373.
 Cesena Sulphur Co. v. Nicholson, 164, 165.
 Challenge, and Duc d'Aumale, The, 404.
 Chamberlain v. Napier, 573, 602, 603, 609, 687, 688.
 Chamberlain's Settlement, *In re*, 198.
 Chance's Case, 218.
 Chancellor, The, 701.
 Chaplin's Petition, *In re*, 308.
 Chapman v. Robertson, 541.
 Charkieh, The, 219.
 Chartered Bank of India v. Netherlands Navigation Co., 72, 247, 248, 588, 602, 603, 606, 608, 621, 622, 623, 694, 700, 702, 703.
 Charteris, *In re*, 542.
 Chatard's Settlement, *In re*, 517, 519.
 Chatenay v. Brazilian, &c. Telegraph Co., 602, 610, 611, 656, 658.
 Chatfield v. Berchtoldt, 539, 540.
 Chellev v. Royal Commission on Sugar Supply, 629.
 Chemische Fabrik v. Badische Anilin, &c. Fabrik, 266.
 Chesham, *In re*, 877.
 Chetti v. Chetti, 289, 500, 502, 664, 683, 684, 839.
 Chichester v. Chichester, 300.
 Chichester v. Donegal, 303.
 Christian v. Christian (1851), 843.
 ——— v. ——— (1897), 299, 358.
 Christiansborg, The, 355.
 Cigala's Settlement Trusts, *In re*, 571.
 Circe, The, 819.
 City Bank v. Barrow, 561.
 City of Mecca, The, 283, 413, 467, 822.
 Clara Killam, The, 284, 819.
 Clark, *Ex parte*, 321.
 Clark, *In re*, 322, 323.
 Clark, *In re*, McKecknie v. Clark, 344.
 Clark v. Bowring & Co., 765.
 Clarke v. Ormonde, 229.
 Clegg v. Levy, 583, 637.
 Clements v. Macanlay, 598.
 Clinton, *In re*, 228.
 Cloete, *In re*, 219, 222.
 Clokey v. London & N. W. Railway Co., 246.
 Clugas v. Penaluna, 597, 599, 862.
 Clydesdale Bank v. Anderson, 367.
 ———, Ltd. v. Schroeder & Co., 440.
 Cochrane v. Moore, 620.
 Cockerell v. Dickens, 367, 473.
 Cockrell v. Cockrell, 111, 147, 794, 795.
 Cocquerel, *In re*, 339.
 Cohen v. Rothfield, 355, 358, 359.
 ——— v. S. E. R. Co., 626, 628, 629.
 Cohn v. Boulken, 660.
 Collier v. Rivaz, 7, 81, 109, 112, 117, 119, 120, 772, 773, 774, 780.
 Collins v. North British, &c. Insurance Co., 268, 269.
 Colliss v. Hector, 418, 440, 554, 573, 686, 687, 691.
 Colonial Bank v. Cady, 565, 566, 648.
 Comber v. Leyland, 265.
 Commercial Bank of India, *In re*, 330, 332, 334.
 Commercial Bank of South Australia, *In re*, 332, 334, 645.
 Commissioner of Stamp Duties v. Salting, 346.
 Commissioner of Stamps v. Hope, 344, 345, 348, 350.
 Commonwealth v. Lane (Am.), 665.
 Compagnie Générale Transatlantique v. Law, 163.
 Companhia de Moçambique v. British South Africa Co., 2, 31, 34, 40, 55, 223, 781.
 Compton v. Bearcroft, 583, 585, 665.
 Connelly v. Connelly, 514.
 Connolly Bros., *In re*, 358.
 Connor v. Bellamont, 655.
 Constantinidi v. Constantinidi, 418.
 Constitution, The, 219, 389.
 Continental Gas Association v. Nicholson, 164.
 Conway v. Beazley, 842.
 Cood v. Cood, 229, 618, 619, 854.
 Cooe, In Goods of, 339, 348, 350, 351.
 Cook v. Gregson, 709, 711, 712.
 Cook v. Sprigg, 23.
 Cooke's Trusts, *In re*, 577, 578, 579, 685, 866.
 Cooke v. Charles A. Vogeler & Co., 319.
 Cookney v. Anderson, 213, 225.
 Cooper v. Cooper, 554, 577, 578, 579, 581, 686, 866, 872.
 Cooper v. Crane, 301.
 ——— v. Waldegrave, 634, 639, 655.

- Cooper-King *v.* Cooper-King, 514.
 Coote *v.* Jeeks, 570.
 Cope *v.* Doherty, 702.
 Copin *v.* Adamson, 45, 394, 397, 404, 405.
 Coppin *v.* Coppin, 547.
 Corbett *v.* General Steam Navigation Co., 164.
 Corporation of Glasgow *v.* Johnston, 407.
 Cosnahan, In Goods of, 487, 719.
 Cotting *v.* De Sartigas (Am.), 740.
 Cotton *v.* R., 230.
 Courier, The, 819.
 Coutts & Co. *v.* Church Missionary Society, In *re* Simpson, 747.
 Cowan *v.* Braidwood, 409.
 Cowley *v.* Cowley, 298.
 Cox *v.* Mitchell, 359.
 Craig, In *re*, 473, 474.
 Craigie *v.* Lewin, 141, 143, 145, 158, 159, 721.
 Craignish *v.* Hewitt, 91, 97, 104, 140, 144, 691.
 Cranstown *v.* Johnston, 34, 229.
 Craster *v.* Thomas, 427, 443, 484.
 Crawley *v.* Isaacs, 440.
 Cresswell *v.* Parker, 252.
 * Crichton's Trust, In *re*, 520.
 Crispin, *Ex parte*, 315, 316, 317, 319, 320, 324, 325.
 Croft *v.* King, 268.
 Croker *v.* Marquis of Hertford, 99, 100, 734.
 Crookenden *v.* Fuller, 144, 734, 772.
 Crosby *v.* Wadsworth, 257.
 Crosland *v.* Wrigley, 591.
 Cronch *v.* Crédit Foncier of England, 648, 650.
 Crumpton's Judicial Factor *v.* Finch-Noyes, 104, 128, 129, 133.
 Culling *v.* Culling, 670, 675, 783.
 Cunningham, *Ex parte*, 158, 159, 259, 260, 322.
 Cunningham *v.* Dunn, 598.
 Curling *v.* Thornton, 143, 145.
 Currey, In *re*, 687.
 Currie *v.* Birchem, 489, 493.
 ——— *v.* McKnight, 701.
- D.
- Da Cunha, In *re*, 509, 577.
 Daimler Co. *v.* Continental Tyre and Rubber Co., 812.
 Dale, In *re*, 552, 781.
 Dalhousie *v.* McDonall, 106, 522, 526, 717.
 Dallington, The, 704.
 Dalrymple *v.* Dalrymple, 7, 583, 585, 661, 665, 666, 677.
 Daly's Settlement, In *re*, 134, 750, 752.
 Dampskibsselskabet Aurdal *v.* Companhia de Navegação La Estrella, 597.
 Dando *v.* Boden, 645.
 Daniel *v.* Luker, 492.
 Danzig, The, 818.
 Daubuz *v.* Morshead, 234.
 Davidson's Trusts, In *re*, 473.
 Davidsson *v.* Hill, 248.
 Davis *v.* Adair, 115, 116, 143.
 Dawson *v.* Jay, 519.
 ——— *v.* Meuli, 198.
 D'Angiban, In *re*, 742.
 De Almeda, In *re*, 141.
 Dearle *v.* Greenbank, 872.
 De Beers Consolidated Mines, Ltd. *v.* British South Africa Co., 228, 553, 572, 602.
 Debendra Nath Dutt *v.* Administrator-General of Bengal, 443.
 De Bernales *v.* New York Herald, 266.
 De Bonneval *v.* De Bonneval, 150, 151, 719.
 De Brimont *v.* Penniman, 452, 454.
 De Cleremont *v.* Brasch, 626.
 De Cosse Brissac *v.* Rathbone, 403, 404, 444, 445, 447.
 D'Este's Settlement, In *re*, 731, 754, 755, 755.
 D'Etchegoyen *v.* D'Etchegoyen, 113.
 De Fogassieras *v.* Duport, 77, 390, 530, 539, 547, 551, 721.
 De Gasquet James *v.* Mecklenburg Schwerin, 276, 298, 300.
 De Geer *v.* Stone, 181.
 De Greuchy *v.* Wills, 691.
 De Hart *v.* Compania Anonima de Seguros "Aurora," 630.
 D'Huart *v.* Harkness, 744, 745, 746, 747, 749, 751, 752.
 De Jager *v.* Attorney-General of Natal, 167.
 De la Chaumette *v.* Bank of England, 566, 634, 641.
 Delage *v.* Nugget Polish Co., 601.
 De Larragoiti, In *re*, 537.
 De la Rue, In *re*, 339.
 De la Saussaye, In Goods of, 339.
 Delaurier *v.* Wyllie, 656.
 De la Vega *v.* Vianna, 234, 247, 762, 764.
 De Linden, In *re*, 536.
 De Mello Mattos, *Ex parte*, 763.
 De Montaigne *v.* De Montaigne, 135, 291, 294, 295, 665, 826 *et seq.*, 834, 835, 838, 866.
 De Mora *v.* Concha, 714.
 Dendre Valley Co., In *re*, 333.
 De Nicols, In *re*, 554, 556, 695, 764, 853.
 De Nicols *v.* Curlier, 555, 686, 690, 692.
 d'Orléans, In Goods of Duchess, 150, 580.
 De Penny, In *re*, 253, 266, 267, 496, 714.
 Derwent Rolling Mills Co., In *re*, 358.
 Deschamps *v.* Miller, 223, 225.
 Deutsche National Bank *v.* Paul, 268, 271, 272.
 Dever, *Ex parte*, 62, 606.

De Virte, *In re*, 872.
 Dewar v. Maitland, 872, 873.
 De Wilton, *In re*, 501.
 — v. Montefiore, 678, 680, 681.
 De Wütz v. Hendricks, 594.
 De Zichy Ferraris v. Hertford, 721.
 Diana, The, 819.
 Dicks v. Dicks, 296, 298.
 Dictator, The, 403.
 Didisheim v. London & Westminster Bank, 536.
 Di Ferdinando v. Simon, Smits & Co., 659, 660.
 Dillon v. Alvares, 359.
 Di Savini v. Lousada, 509, 517, 519.
 Dobell v. Steamship Rossmore Co., 62.
 Dobree v. Napier, 696, 697, 703.
 Dobson v. Dobson, 291.
 — v. Festi, &c., 276.
 Doe v. Jones, 178.
 — d. Auchmuty v. Mulcaster, 197.
 — d. Thomas v. Acklam, 197.
 — v. Vardill, 531.
 Doetsch, *In re*, 710, 764.
 Dogliani v. Crispin, 53, 54, 120, 239, 352, 427, 428, 430, 446, 469, 470, 716, 718, 720, 776, 850.
 Dolphin v. Robins, 134, 135, 136, 137, 285, 288, 350, 420, 421, 436.
 Dombrowitzki v. Dombrowitzki, 844.
 Don's Estate, *In re*, 522, 527, 528, 531, 544.
 Don v. Lippmann, 634, 641, 762, 767.
 Donaldson v. McClure, 115.
 Donegani v. Donegani, 184.
 Dost Aly Khan, *In Goods of*, 486, 719.
 Doucet v. Geoghegan, 95, 97, 115, 116, 143, 144, 354.
 Douglas v. Douglas, 115, 117, 131, 141, 143, 147, 797.
 Douglas v. Forrest, 50, 393, 401, 409.
 — v. Jones, 409.
 Douglas's Trustees v. Douglas, 877.
 Doulsen v. Matthews, 223, 224.
 Dowdale's Case, 378, 379.
 Drevon v. Drevon, 143, 797.
 Drexel v. Drexel, 114, 143, 260.
 Drummond v. Drummond, 547, 871.
 Dubout, &c. Co., v. Macpherson, 279.
 Duc d'Aumale, The, 268, 269.
 Duchess of Kingston's Case, 433.
 Duder v. Amsterdamsch Trustees Kantoor, 39, 226, 230, 269.
 Dulaney v. Merry & Son, 476, 569, 570, 571.
 Dunbar, *In re*, 160.
 Duncan v. Cannan, 686, 687, 688, 689.
 — v. Dixon, 579, 686.
 — v. Lawson, 22, 77, 530, 532, 539, 544, 547, 551, 716.
 Duncan v. Manchester, 338.
 Dundas v. Dundas, 870, 873.
 Du Moulin v. Druitt, 670.
 Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft, 163, 249.
 Dunlop Rubber Co. v. Dunlop, 266.
 Dupleix v. De Rovent, 345.

Dupleix, The, 237, 283, 403.
 Dupuy v. Wurtz (Am.), 734.
 Durham v. Spence, 56.
 Dynamit Actiengesellschaft v. Rio Tinto Co., 595.

E.

Eager, *In re*, 250, 252, 353.
 Eames v. Hacon, 354, 714.
 Earl, *In Goods of*, 486, 487.
 Ebbert v. Fowler, 531.
 Eclipse, The, and The Saxonia, 701.
 Edelstein v. Schuler & Co., 648, 652, 654.
 Eden v. Weardale, &c. Co., 279.
 Edinburgh v. Kirk, 515.
 Edison, &c. Co. v. Holland, 279.
 Edwards v. Ronald, 370, 483.
 Egbert v. Short, 357.
 Elen, The, 765.
 Ella A. Clark, The, 821.
 Elliott, *In re*, 725.
 — v. Johnson, 725.
 — v. Minto, 871.
 Ellis v. Ellis, 444.
 Ellis v. McHenry, 371, 372, 444, 447, 477, 478, 479, 480, 481, 483, 484, 615, 616, 848.
 Elton, The, 249.
 Emanuel v. Symon, 394, 397, 405, 407, 408, 409.
 Embiricos v. Anglo-Austrian Bank, 59, 561, 565.
 Emperor of Austria v. Day, 230, 234.
 Empress, The, 816.
 English Bank of the River Plate, *In re*, 645.
 English, Scottish and Australian Chartered Bank, *In re*, 333.
 English's Coasting & Shipping Co., Ltd. v. British Finance Co., Ltd., 460.
 Enohin v. Wylie, 53, 54, 239, 339, 348, 352, 354, 377, 415, 427, 486, 714, 715, 721, 868.
 Ertel Bieber & Co. v. Rio Tinto Co., 597.
 Espauoleto, The, 281, 284, 819.
 Este v. Smyth, 61, 573, 574, 662, 686, 688.
 Evangelistria, The, 817.
 Ewing, *In Goods of*, 340, 341, 345, 348, 349.
 Ewing v. Orr Ewing (1883), 53, 225, 257, 228, 348, 352, 375, 377, 379, 427, 494, 715, 867, 868.
 Ewing v. Orr Ewing (1885), 53, 54, 225, 239, 337, 352, 377, 383, 427, 714, 867, 868.
 Explorer, The, 248.
 Express, The, 624.

F.

Fabrigas *v.* Mostyn, 184.
 Factage Parisien, *Re The*, 333.
 Factories Insurance Co. *v.* Anglo-
 Scottish, &c. Insurance Co., 235.
 Farquharson *v.* Morgan, 236.
 Feaubert *v.* Turst, 686.
 Fennings and others *v.* Lord Grenville,
 700.
 Fenton *v.* Livingstone, 522, 544, 549.
 Ferguson *v.* Spencer, 483.
 Fergusson *v.* Pyffe, 654, 655, 767.
 Fergusson's Will, *In re*, 532, 731.
 Fergusson & Co., Ltd. *v.* Brown, 461.
 Fernandes' Exors'. Case, 340, 348.
 Feyerick *v.* Hubbard, 398, 405.
 Field *v.* Bennett, 249, 251.
 Finlay *v.* Finlay, 766.
 Firbank, *In re*, *Ex parte* Knight, 474.
 Firebrace *v.* Firebrace, 158, 296, 299,
 300.
 Fisher *v.* Begrez, 216, 218.
 Fitch *v.* Weber, 800.
 Fittock, *In Goods of*, 339, 348.
 Fitzgerald, *In re*, 343, 540, 572, 595,
 689.
 Flack's Case, 373.
 Flendt *v.* Scott, 810.
 Fletcher *v.* Alexander, 630.
 Folliott *v.* Ogden, 230, 476, 503, 504.
 Fontaine's Case, 458.
 Forbes *v.* Adams, 541.
 ——— *v.* Cochrane, 502.
 ——— *v.* Eastern & Australian Steam-
 ship Co., 704.
 ——— *v.* Forbes, 101, 102, 106, 109,
 127, 136, 145, 147.
 ——— *v.* Steven, 77, 541.
 Ford *v.* Cotesworth, 599.
 ——— *v.* Shephard, 251.
 Forayth *v.* Forsyth, 686.
 Foster *v.* Globe Venture Syndicate, 215.
 Francis *v.* Sea Insurance Co., 598.
 Francke and Rasch. *In re*, 614, 616, 643.
 Franconia, The, 248.
 Fraser, *In re* P. A., 339.
 ——— *v.* Akers, 72.
 Frayes *v.* Worms, 448, 457.
 Frederick *v.* Attorney-General, 310.
 Freeman *v.* East India Co., 561, 626.
 Freke *v.* Lord Carbery, 77, 530, 531,
 539, 547, 552, 717, 721, 740.
 French Government *v.* Owners of S.S.
 Tsurushima Maru, 234.
 Frère *v.* Frère, 772.
 Freyberger, *Ex parte*, 199, 810.
 Fried Krupp Actien-Gesellschaft, *In re*,
 230, 615.
 Fry *v.* Moore, 241; 251.
 Furness, Withy & Co. *v.* Rederaktie-
 golabet Banco, 599.

G.

Gaetano, The, 283, 588, 592, 602, 603,
 622, 623, 624, 625, 626, 701.
 Gagara, The, 216.
 Galbraith *v.* Grimshaw, 365, 458, 475,
 476.
 Gally, *In re*, 723, 726.
 Gambier *v.* Gambier, 515, 516.
 Gardiner *v.* Houghton, 477, 478, 479,
 480, 482.
 Garnier, *In re*, 536.
 Gas Float Whitton, The (No. 2), 820.
 Gatti, *In Goods of*, 723, 726.
 Gayer *v.* Gayer, 285.
 Geddes *v.* Mowat, 476, 477.
 Gelot *v.* Stewart, 598.
 Gemma, The, 237, 283, 403.
 General Company for Promotion of
 Land Credit, *In re*, 333.
 General Iron Screw Co. *v.* Schurmanns,
 702.
 General Steam Navigation Co. *v.* Guillou,
 455, 512.
 Gentili, *In Goods of*, 77, 530, 531, 547,
 552, 717, 721.
 Georges, *In re*, 555.
 Ghikis *v.* Musurus, 222.
 Gibbs *v.* Fremont, 634.
 ——— *v.* La Société Industrielle des
 Métaux, 371, 478, 479, 480, 481, 482,
 602, 610, 616, 847, 848.
 Gibson, *Ex parte*, 325.
 ——— *v.* Holland, 575.
 ——— & Co. *v.* Gibson, 50, 174, 401,
 402, 407, 408, 827.
 Gill *v.* Barron, 483, 484.
 Gillis *v.* Gillis, 84, 101, 288.
 Gladstone *v.* Musurus Bey, 217, 239.
 Glasgow, The, 816.
 Godard *v.* Gray, 247, 393, 430, 444,
 445, 446, 447, 450.
 Goetze *v.* Aders, 475.
 Goldsmid, *Ex parte*, 763.
 Goodman *v.* Goodman, 507, 525, 850.
 Goodman's Trusts, *In re*, 22, 106, 354,
 507, 525, 528, 530, 532, 551, 717, 718,
 850.
 Goodwin *v.* Robarts, 634, 648, 650, 653.
 Gordan *v.* Stair, 534.
 Gorgier *v.* Mieville, 653.
 Gould & Coombs, 647.
 Goulder *v.* Goulder, 106, 127, 147, 285,
 288.
 Gout *v.* Zimmermann, 138.
 Graff Arthur Bernstorff, The, 816.
 Graham *v.* Maxwell, 358, 377.
 Gran *v.* Gran, 159.
 Grant *v.* Anderson, 275, 276.
 ——— *v.* Rose, 534.
 Grassi, *In re*, 556, 725, 726.
 Grazebrook *v.* Fox, 444.
 Great Australian Co. *v.* Martin, 253.
 ——— Northern Railway Co. *v.* Laing,
 571.
 ——— Great West Saddlery Co. *v.* The
 King, 512.

Green, *In re*, Noyes v. Pitkin, 661, 666.
 ——— v. Green, 387, 420.
 ——— v. Meinall, 681.
 Greer v. Poole, 60, 607, 631.
 Grell v. Levy, 589, 595, 600, 862.
 Grenal v. Grenal, 289.
 Gretton v. Haward, 874.
 Grey v. Manitoba, &c. Co., 228.
 Grey's Trusts, *In re*, 528, 530, 531, 549, 787, 851.
 Griefswald, The, 284, 456, 819.
 Grierson v. Grierson, 665.
 Grimthorpe's Settlements, *In re*, 812.
 Grinwood v. Bartels, 536, 553.
 Groos, *In Estate of*, 487, 732, 733, 737, 739, 748, 749, 750.
 ——— *In re*, Groos v. Groos, 692, 736.
 Grove, *In re*, Vaucher v. Solicitor to Treasury, 117, 147, 521, 523, 524.
 Grundt, *In Estate of*, 487.
 Gschwind v. Huntington, 199.
 Guaranty Trust Co. of New York v. Hannay, 635, 640, 648.
 Guépratte v. Young, 580.
 Guérin v. Bank of France, 168.
 Guest v. Shipley, 300.
 Guiard v. De Clermont, 393, 403, 404.
 Guier v. O'Daniel (Am.), 141.
 Guldface, The, 248.
 Gurney v. Rawlins, 344.
 Gutierrez, *Ex parte*, 260, 317.

H.

Haas v. Atlas Assurance Co., Ltd., 338, 350.
 Hadad v. Bruce, 258, 260.
 Hadley, *In re*, 759.
 Hagen, The, 355.
 Haggin v. Comptoir d'Escompte de Paris, 250.
 Haldane v. Eckford, 109, 147.
 Hall v. Odber, 449, 454.
 Hall's Trustees v. Hall, 691.
 Halley, The, 34, 38, 452, 696, 704, 819.
 Hallyburton, *In Goods of*, 744, 745, 746, 748, 753.
 Halsey and Another v. Löwenfeld, 811.
 Hamburg, The, 624.
 Hamilton v. Dallas, 119, 120, 144, 734, 780.
 ——— v. Whyte, 729.
 Hamlyn v. Talisker Distillery, 63, 361, 572, 588, 590, 591, 592, 602, 606, 607, 612, 860, 861.
 Hansen v. Dixon, 609, 765.
 Hanson v. Walker, 548.
 Hardie v. Hardie, 298.
 Hare v. Nasmyth, 719.
 Harman, *In re*, 757.
 Harmony, The, 143, 145, 146.
 Harral v. Harral, 554.
 Harris, *In Goods of*, 339.
 ———, *In re*, 367.

Harris's Trustees, 555.
 Harris v. Fleming, 253.
 ——— v. Owners of Franconia, 248.
 ——— v. Quine, 455, 456, 457, 767,
 ——— v. Saunders, 712.
 ——— v. Scaramanga, 630.
 ——— v. Taylor, 236, 237, 243, 393, 403, 404, 468.
 Harrison v. Gurney, 229.
 ——— v. Harrison, 226, 229, 873, 876.
 Harrop v. Harrop, 448, 452, 454.
 Hart v. Von Gumpach, 695.
 Harvey v. Dougherty, 260, 269, 270.
 ——— v. Farnie, 285, 388, 416, 417, 446, 447, 842.
 Hawthorne, *In re*, 223, 224, 228.
 Hay v. Jackson & Co., 355.
 ——— v. Northcote, 302, 304, 662, 673.
 Hayward, *In re*, 474.
 Heath v. Samson, 151, 157.
 Hecquard, *In re*, 259, 260, 326.
 Heilman v. Falkenstein, 358.
 Heinemann v. Hale, 242, 276.
 Hellfeld v. Rechnitzer, 267, 276, 511.
 ——— v. Rechnitzer (1914), 811.
 Hellmann, *In re*, 509, 520.
 Henderson, *In re*, Nouvion v. Freeman, 446.
 ——— v. Henderson, 440, 444, 446, 448, 451, 456.
 Henley v. Soper, 448, 449, 451.
 Henrich Björn, The, 820.
 Hepburn v. Skirving, 152.
 Herbert v. Herbert, 661.
 Hernando, *In re*, 543, 544, 549, 551, 554.
 Hervey v. Fitzpatrick, 493.
 Hessing v. Sutherland, 535.
 Hewit, *In re*, 710.
 Hewit's Trustee v. Lawson, 877.
 Hewitt, *In re*, 363.
 Hewitt's Settlement, *In re*, 609, 687.
 Hewson v. Shelley, 427, 444.
 Hinks v. Powell, 226, 544, 548, 553, 557, 558, 619.
 Higgs v. Higgs, 662, 667.
 Hilekes, *In re*, 166, 812.
 Hill, *In Goods of*, 486, 487.
 ——— v. Wilson, 630.
 Hillyard v. Smith, 251.
 Birschfeld v. Smith, C34, 642.
 Hoare v. Hornby, 689.
 Hobbs v. Henning, 465.
 Hodgson v. De Beauchesne, 143, 147, 149, 159.
 Holland v. Bennett, 264.
 Holmes, *Re*, 225.
 Holthausen, *Ex parte*, 706, 707, 708.
 Holyoke v. Haskins (Am.), 127, 130, 131.
 Hood v. Lord Barrington, 496.
 Hoop, The, 810.
 Hooper v. Gumm, 24, 59, 563, 620.
 Hope v. Carnegie, 228, 358, 377.
 ——— v. Derwent Rolling Mills Co., Ltd., 410.
 ——— v. Hope, 595.

Hopkins *v.* De Robeck, 218.
 Horne *v.* Rouquette, 634, 637, 639, 642.
 Hosier Bros. *v.* Derby, 215.
 Hoskins *v.* Matthews, 109, 113, 143, 154, 798.
 Houlditch *v.* Donegal, 445.
 Houstoun, *In re*, 534, 535.
 Howden, *In Goods of* Lord, 339, 341.
 ——— (James) & Co. *v.* Powell
 Duffryn Steam Coal Co., Ltd., 602.
 Howe *v.* Dartmouth, 551.
 ——— Machine Co., *In re*, 459.
 Hoyles, *In re*, Row *v.* Jagg, 76, 541, 542, 548.
 Huber, *In Goods of*, 745, 746, 748, 750, 753.
 ——— *v.* Steiner, 617, 767.
 Huggins, *Ex parte*, 650.
 Hughes *v.* Oxenham, 272.
 Hume *v.* Hume, 844.
 Hummel *v.* Hummel, 748, 750.
 Humphrey *v.* Humphrey, 418, 419.
 Hunter *v.* Potts, 367, 478.
 ——— *v.* Stewart, 456.
 Huntington *v.* Attrill, 230, 231, 232, 452, 453, 503.
 ——— *v.* Attrill (Am.), 230, 231, 452.
 Huntley *v.* Gaskell, 109, 115, 116, 121, 141, 145, 229, 360.
 Huthwaite *v.* Phaire, 492.
 Hyde *v.* Hyde, 31, 286, 289, 290, 502.

I.

Imperial Continental Gas Association *v.*
 Nicholson, 164.
 ——— Japanese Government *v.*
 P. & O. Co., 221.
 India, The, 821.
 Indian Chief, The, 158, 782.
 ——— & General Investment Trust,
 Ltd. *v.* Borax Consolidated, Ltd.,
 230, 599, 601, 617.
 Indigo Co. *v.* Ogilvy, 270, 276.
 Industrie, The, 622, 623, 625.
 Inglis *v.* Robertson, 349, 560, 561, 562.
 ——— *v.* Usherwood, 561.
 Ingliss *v.* Grant, 316.
 Innes *v.* Dunlop, 565.
 ——— *v.* Mitchell, 714.
 International Pulp and Paper Co., *In re*,
 372, 373.
 Ireland *v.* Livingston, 613.
 Irwin *v.* Caruth, 495.
 Isaacson *v.* Durant, 170, 184, 197.

J.

Jack *v.* Jack, 844.
 Jackson *v.* Petrie, 229.
 ——— *v.* Spittall, 55, 241, 245, 250, 251.

Jacobs *v.* Crédit Lyonnais, 588, 590, 598, 599, 602, 603, 605, 607, 609, 610, 611, 620, 621, 625, 852, 855, 860, 863, 864.
 Jaffé *v.* Keel, 179, 193, 207, 311.
 Jaffer *v.* Williams, 393, 398, 407.
 James *v.* Barry, 116.
 ——— *v.* James, 115, 156, 798.
 Janson *v.* Driefontein Consolidated
 Mines, Ltd., 234, 812.
 Japanese Government *v.* P. & O. Co.,
 221.
 Jassy, The, 216.
 Jauncy *v.* Sealey, 489, 493.
 Jay *v.* Budd, 250.
 Jeannot *v.* Fuerst, 393, 394, 405, 440, 448.
 Jeffery *v.* McTaggart, 472.
 Jenney *v.* Mackintosh, 226, 230, 269.
 Jephson *v.* Riera, 184.
 Jerningham *v.* Herbert, 540, 870.
 Johannes, The, 819, 820.
 Johannesburg Municipal Council *v.*
 D. Stewart & Co., Ltd., 602.
 John *v.* John, 337.
 Johnson *In re*, Roberts *v.* Attorney-
 General, 50, 80, 120, 402, 669, 716, 778, 779, 780.
 Johnson *v.* Cooke, 303, 305, 424.
 ——— *v.* Taylor Bros., 263.
 ——— *v.* Warwick, 338.
 Johnston *v.* Attorney General, 300.
 ——— *v.* Salvage Association, 279.
 Johnstone *v.* Baker, 540, 870.
 ——— *v.* Beattie, 127, 128, 141, 153, 514, 515, 517, 518, 519.
 Jollet *v.* Deponthieu, 473.
 Jones *v.* Garcia del Rio, 594.
 ——— *v.* Scottish Accident Insurance
 Co., 163, 164, 165, 261.
 ——— *v.* Somervell's Tr., 761.
 ——— *v.* Victoria Graving Co., 764.
 Jopp *v.* Wood, 81, 109, 115, 116, 136, 147, 149, 160, 796, 797.
 Jopson *v.* James, 358.
 Joynt *v.* McCrum, 269.

K.

Karnak, The, 625.
 Kaufman *v.* Gerson, 34, 36, 595, 784.
 Kaye *v.* Sutherland, 256, 257.
 Kearney *v.* King, 613, 634.
 Kelly *v.* Selwyn, 346, 568.
 Kelly *v.* Webster, 257.
 Kelsall *v.* Marshall, 394, 444, 455.
 Kensington *v.* Inglis, 810.
 Kent, The, 816.
 ——— *v.* Burgess, 424, 584, 585, 671, 678, 682.
 Ker *v.* Wauchope, 872.
 Kerr *v.* Martin, 527.
 Keyes *v.* Keyes, 160, 420, 421, 797, 846.
 Kildare *v.* Eustace, 228, 229.
 Kinahan *v.* Kinahan, 253, 266.

- King & Co.'s Trademark, *In re*, 238, 276.
 King v. Foxwell, 84, 112, 113.
 Kingston's (Duchess) Case, 433.
 Kirchner & Co. v. Gruban, 405.
 Kirsch v. Allen, Harding & Co., 659.
 Kirwan's Trusts, *In re*, 744, 745, 747, 748, 750, 751, 752.
 Kloehe, *In re*, 377, 706, 709, 710, 711, 712, 872.
 Knight, *In re*, 536, 537, 538.
 Kolchmann v. Meurice, 272.
 Kopelowitz v. McLaughlan, 199.
 Korel v. Korel, 302.
 Korvine's Trust, *In re*, 561.
 Krauss v. Krauss, 288, 810.
 Kronprinz Olav, The, 702.
- L.
- Lacave v. Crédit Lyonnais, 561.
 Lacon v. Higgins, 678.
 Lacroix, *In Goods of*, 82, 713, 720, 722, 726, 728, 772, 774.
 Laidlay v. Lord Advocate, 340, 345, 346, 348, 349.
 Lamotte, *In re*, 363.
 Lane, *In re*, 269, 353.
 Laneville v. Anderson, 486, 487, 488, 720, 772.
 Lang v. Lang, 296.
 Langworthy, *Ex parte*, 322.
 Larivière v. Morgan, 217, 239.
 Larpent v. Sindry, 719.
 Lashley v. Hog, 553, 691, 692.
 Lasseur v. Tyrconnel, 486.
 Landerdale Peerage Case, The, 115.
 Langhland v. Wansborough Paper Co., Ltd., 262.
 Lautour v. Teesdale, 662, 667.
 Law v. Garrett, 355, 404, 405.
 Lawford v. Davies, 303, 585, 666.
 ——— v. Pryce, *In re Pryce*, 754, 758, 759, 760.
 Lawrence v. Kitson, *In re Smith*, 226, 546, 572.
 ——— v. Kitteridge, (Am.), 709, 720, 721.
 Lawson v. Commissioners of Inland Revenue, 343, 540.
 Lawson's Trusts, *In re*, 473.
 Lebeaupin v. Crispin, 659.
 Lebel v. Tucker, 634, 639, 641.
 Le Bret v. Papillon, 234.
 Le Breton v. Miles (Am.), 687.
 Le Couturier v. Reg., 230, 239.
 Lee v. Abdy, 566, 569, 596.
 Le Feuvre v. Sullivan, 566, 567, 596.
 Leggat Bros. v. Gray, 410.
 Le Mesurier v. Le Mesurier, 41, 285, 286, 287, 292, 293, 296, 297, 416, 418, 421, 422, 825, 844, 845, 866.
 Lemme, *In Goods of*, 486.
 Lenders v. Anderson, 265.
 Leon, The, 247, 248, 702.
 Leon XIII, The, 822.
 Le Page v. San Paulo Coffee Estates Co., Ltd., 473.
 Leroux v. Brown, 546, 575, 583, 585, 764.
 Le Sueur v. Le Sueur, 135.
 Lett v. Lett, 686.
 Levy's Trusts, *Re*, 473.
 Levy v. London County Council, 865.
 ——— v. Solomon, 531.
 Lewal's Settlement Trusts, *In re*, 743, 744, 745, 754, 758, 759, 760.
 Lewis v. Owen, 480.
 Liebmann, *Ex parte*, 810.
 Lighthody v. West, 662, 671, 685, 783.
 Lightfoot v. Tenant, 597, 600.
 Lightowler v. Lightowler, 270.
 Limerick v. Limerick, 661.
 ——— Corporation v. Crompton, 235, 355, 607.
 Lindsay v. Paterson, 367.
 Linke v. Van Aerde, 301, 304.
 Lisbon Berlyn Goldfields v. Heddle, 267.
 Lister's Judicial Factor v. Syme, 688.
 Liverpool Marine Credit Co. v. Hunter, 440, 561, 568, 764.
 Lloyd v. Guihart, 60, 62, 572, 588, 602, 603, 605, 608, 609, 610, 618, 619, 622, 623, 624, 625, 630, 701, 789, 860.
 ——— v. Petitjean, 662.
 ——— Generale Italiano, *In re*, 329, 330, 331.
 Lloyd's Bank v. Swiss Bankverein, 654.
 Lockhart, *In Goods of*, 341.
 Logan v. Bank of Scotland (No. 1), 245.
 ——— v. ——— (No. 2), 241, 252, 356, 360, 361.
 ——— v. Fairlie, 380, 493.
 Lolley's Case, 29, 286, 417, 418, 421, 442, 510, 841, 842, 844.
 London Bank of Mexico v. Apthorpe, 164.
 ———, & Co. Bank v. Earl of Clancarty, 645.
 ——— Joint Stock Bank v. Simmons, 649.
 ——— & North Western Ry. Co. v. Lindsay, 409, 410, 461.
 Lopez v. Chavarri, 270.
 Lord v. Colvin, 790, 793.
 ——— Advocate v. Brown's Trustees, 109.
 ——— v. Jaffrey, 135, 293, 350.
 Loustalan v. Loustalan, *In re Martin*, 119, 120, 152, 548, 554, 737, 738, 739, 757, 780.
 Low, *In re*, 377, 458, 459, 461.
 ——— v. Low, 420, 844.
 Lowe v. Fairlie, 380, 493, 494.
 Lowrie v. Bradley (Am.), 110, 735.
 Lyall v. Paton, 116, 118, 795.
 Lynch v. Provisional Government of Paraguay, 230, 503, 713, 718, 719.
 Lyne's Settlement Trusts, *In re*, 539, 541, 725, 726, 745, 747, 749.
 Lyne v. De la Ferté, 725.

Lyne *v.* Gibbs, 539, 541, 726, 726, 745.
Lyons, Mayor of *v.* East India Co.,
184.

M.

Maanass *v.* Henderson, 659.
McCarthy *v.* De Caix, 286, 421, 841.
Macartney, *In re*, 448, 452, 454.
——— *v.* Garbutt, 216, 219, 688.
McCheane *v.* Gyles, 279.
McCormick *v.* Garnett, 686.
McCulloch, *Ex parte*, 324, 325, 326,
327, 328, 475, 476.
Macdonald *v.* Macdonald, 723.
——— *v.* ——— (Sc.), 693.
McDonnell *v.* McDonnell, 448, 452.
Macfadyen & Co., *In re*, 471, 477.
Macfarlane *v.* Macartney, 448, 452, 454.
MacFarlane *v.* Norris, 768.
M'Feetridge *v.* Stewarts, 577, 580, 583.
Macgregor *v.* Lowe, 594.
Machado *v.* Fontes, 38, 696, 698, 699.
McHenry *v.* Lewis, 355, 356, 359, 360.
MacIver *v.* Burns, 277.
Mackenzie, *In Goods of*, 488.
Mackenzie, *In re*, 134, 135, 420, 553,
688.
Mackereth *v.* Glasgow *v.* S.W. Rail-
way, 244.
Mackie *v.* Darling, 520.
Mackinnon's Trustees *v.* Lord Advocate,
see Brown *v.* Gregson.
Macleod *v.* Attorney-General for New
South Wales, 28, 473.
McLoughlin, *In re* Estate of, 584, 678,
682.
Macnamara *v.* D'Euvreux, 594.
McNeill *v.* McGregor, 527.
Macnichol, *In re*, 489, 491, 493.
McPhail, *Ex parte*, 253.
Macreight, *In re*, 105, 127, 158.
Madrazo *v.* Willes, 505, 562, 700.
Madrid, &c. Co., *In re*, 333.
Magdalena, &c. Co. *v.* Martin, 216,
218, 219, 220, 234.
Male *v.* Roberts, 501, 580, 582.
Malone's Divorce (Valid Action) Bill,
286, 293.
Maltass *v.* Maltass, 109, 112, 772, 782.
Malvini, The, 819.
Manar, The, 355.
Manchester (Dowager Duchess), *In re*,
Duncannon *v.* Manchester, 338.
Manderson *v.* Sutherland, 845.
Manger *v.* Cash, 433.
Mann, George & Co. *v.* Brown, 601.
Manners *v.* Pearson, 614, 646, 660.
Manning *v.* Manning, 299.
Mansel *v.* Attorney-General, 308, 310.
Maraver, *In Goods of*, 487, 720, 721.
Marburg *v.* Marburg, 659.
Maria *v.* Hall, 811.
Maria Theresa, The, 810.
Markwald *v.* Attorney-General, 194.

Marrett, *In re*, 113, 123.
Marseilles Extension Co., *In re*, 587, 634.
Marshall *v.* Grinbaum, 217.
——— *v.* Marshall, 253, 266.
Marsland, *In re*, 691.
Martin, *In re*, Loustalan *v.* Loustalan,
119, 120, 152, 548, 554, 737, 738, 739,
757, 780.
Mary, Duchess of Sutherland, *In re*, 812.
——— Thomas, The, 630.
Mason *v.* Mason, 139.
Maspons *v.* Mildred, 656, 659, 768.
Massey *v.* Heynes, 269, 270.
Mather *v.* Cunningham (Am.), 93.
Matheson, *In re*, 330, 332, 333, 334.
Matthaei *v.* Galitzin, 225, 228.
Maudslay, Sons & Field, *In re*, 343,
373, 565, 566.
Maunder *v.* Lloyd, 512.
Mavro *v.* Ocean Marine Insurance Co.,
630.
Maxwell *v.* McClure, 144.
——— *v.* Maxwell, 875, 876.
Mayor of London *v.* Cox, 236.
Meatyard, *In Goods of*, 489.
Mecca, The, 819, 820, 821, 822.
Meek *v.* Wendt, 401.
Meeus *v.* Thellusson, 394.
Mehta *v.* Sutton, 561.
Meiklan *v.* Campbell, 714.
Melan *v.* Duke de Fitzjames, 234, 764.
Melbourn, *Ex parte*, 693, 706, 707, 708.
Mellish *v.* Simeon, 634, 644.
Mercantile Bank of Australia, *In re*, 332.
——— Investment, &c. Co. *v.* River
Plate Co., 229, 618.
Merrifield, Ziegler & Co. *v.* Liverpool
Cotton Association, 429.
Metcalf, *Re*, 502.
Mette *v.* Mette, 681, 683, 684.
Meyappa Chetty *v.* Supramanian Chetty,
339, 427.
Meyer *v.* Dresser, 768.
——— *v.* Ralli, 413, 445, 447.
Michael, *Ex parte*, 821.
Mickleham, The, 704.
Middleton *v.* Janverin, 303, 677.
Migazzo, *In Goods of*, 487.
Mighell *v.* Sultan of Johore, 215, 216,
219, 220, 221.
Milford, The, 565, 767.
Millar *v.* Millar, 299.
Miller, *In re*, 61, 542, 732.
——— *v.* Deakin, 666.
——— *v.* James, 719.
——— *v.* Race, 653.
——— Gibb & Co. *v.* Smith & Tyree,
Ltd., 658.
Milnes *v.* Foden, 745.
Minna Craig SS. Co. *v.* Chartered,* &c.
Bank, 365, 368, 371, 373, 413, 414,
445, 465, 466.
Mir-Anwaruddin, *Ex parte*, 289, 416,
500, 684, 839, 840.
Missouri Steamship Co., *In re*, 24, 61,
62, 63, 572, 587, 588, 591, 596, 602,
603, 622, 627, 628, 860, 863.

- Mitchell & Muill, Ltd. *v.* Fenisccliffe Products Co., Ltd., 461.
 Moffatt, *In Goods of*, 486.
 Moffett *v.* Moffett, 109, 115, 116, 143, 521.
 Molony *v.* Gibbons, 394.
 Monteith *v.* Monteith's Trustees, 539.
 Montgomery *v.* Zarifi, 686, 688.
 Montgomery, Jones & Co. *v.* Lieben-thal & Co., 246, 273.
 Montrosa, The, 817.
 Moor *v.* Anglo-Italian Bank, 225.
 Moore *v.* Bull, 302, 424.
 ——— *v.* Darell, 719.
 Moore and Weinberg *v.* Ernsthausen, 461.
 Moorhouse *v.* Lord, 109, 116, 153, 793, 794, 797.
 Mordaunt *v.* Moncrieffe, 824, 843.
 ——— *v.* Mordaunt, 824, 843.
 Morgan *v.* Jones, 647.
 ——— *v.* Larivière, 217.
 "Morocco Bound" Syndicate, Ltd. *v.* Harris, 34, 224.
 Moses, *In re*, 530, 551.
 Mostyn *v.* Fabrigas, 223.
 Moulis *v.* Owen, 576, 591.
 Moultrie *v.* Hunt (Am.), 734.
 Möwe, The, 811.
 Moxham, The M., 223, 698, 703, 769.
 Muller & Co.'s Margarine, Ltd. *v.* Commissioners of Inland Revenue, 346.
 Munden *v.* Duke of Brunswick, 216, 217, 218.
 Munro *v.* Coutts, 729.
 ——— *v.* Munro, 106, 141, 143, 145, 522, 523, 524, 525, 526.
 ——— *v.* Saunders, 522.
 Munroe *v.* Douglas, 106, 118, 124.
 Murray *v.* Champernowne, 541, 548, 745.
 Murphy *v.* Deichler, 744, 745, 746.
 Musurus Bey *v.* Gadban, 216, 217, 219, 220, 221.
 Nutrie *v.* Binney, 358, 360.
- N.
- Nash, *In re*, 872.
 Nat *v.* Coon (Am.), 734.
 Nautik, The, 281.
 Nelson, *In re*, 322, 371, 481, 484.
 ——— *v.* Bridport, 548.
 Newbattle, The, 234.
 New Chile Co. *v.* Blanco, 218.
 New Draper, The, 816.
 New Fenix Compagnie, &c. de Madrid *v.* General Accident, &c. Co., 234.
 Newman *v.* Attorney-General, 666.
 Newton *v.* Manning, 504, 535.
 New York Breweries Co., Ltd. *v.* Attorney-General, 338, 346, 485.
 New York Security and Trust Co. *v.* Keyser, 536.
- New Zealand Loan and Mercantile Agency *v.* Morrison, 366, 371, 374.
 Niboyet *v.* Niboyet, 41, 158, 285, 286, 287, 288, 292, 293, 296, 297, 299, 301, 302, 357, 501, 825.
 Nicholls, *In re*, 547.
 Nicols *v.* Nicols, 291.
 Nina, The, 822.
 Norden Steam Co. *v.* Dempsey, 615, 625.
 Nordenfelt, *In re*, 319, 326.
 Nordman *v.* Rayner, 810.
 Norris, *In re*, 260, 326.
 ——— *v.* Chambres, 229.
 North *v.* Stewart, 461.
 North Carolina Estate Co., *In re*, 368, 373.
 Northcote *v.* Owners of Henrich Björn, 283.
 North Western Bank *v.* Poynter, 560, 562, 568, 569.
 Norton *v.* Florence Land, &c. Co., 225, 228, 544, 619.
 Norton's Settlement, *In re*, 357.
 Nouvelle Banque de l'Union *v.* Ayton, 789.
 Nouvion *v.* Freeman, 433, 446, 448, 449, 450, 451.
 Novelli *v.* Rossi, 445.
 Novello *v.* Toogood, 216, 222.
 Noyes *v.* Pitkin, *In re* Green, 661, 666.
 Nugent *v.* Smith, 614.
 ——— *v.* Vetzera, 509, 514, 517, 518, 519.
 Nunneley *v.* Nunneley, 686.
- O.
- O'Callaghan *v.* Thomond, 565.
 Ochsenbein *v.* Papelier, 434, 438.
 Octavie, The, 822.
 Odwin *v.* Forbes, 479.
 Oesterreichische Export, &c. Co. *v.* British Indemnity Co., Ltd., 269.
 Official Assignee, Bombay *v.* Registrar, &c., Amritsar, 471.
 Ogden *v.* Folliott, 230, 502, 504, 562.
 ——— *v.* Ogden, 294, 301, 303, 424, 425, 507, 577, 578, 579, 580, 661, 665, 679, 683, 684, 783, 827, 828, 865, 866.
 Ogilvie, *In re*, 873, 874, 876.
 O'Grady *v.* Wilmot, 759.
 Okura & Co., Ltd. *v.* Forsbacka Jern-verks Aktiebolag, 244.
 Oldenburg, *In Goods of* Prince, 486.
 Oliphant, *Re*, 487.
 Oliver's Settlement, *In re*, 872.
 O'Mara, Ltd. *v.* Dodd, 265.
 Onslow and Allardice *v.* Cannon, 772.
 Orentt *v.* Orms (Am.), 490.
 O'Reardon, *In re*, 476.
 Oriental Inland Steam Co., *In re*, 371, 372, 373.

Orléans, *In Goods of Duchess d'*, 487, 489, 509.
 Orrell *v.* Orrell, 873, 876.
 Orr Ewing, *In re*, Orr Ewing *v.* Orr Ewing, 71.
 O'Shea, *In re*, 575.

P.

Pabst *v.* Pabst, 545.
 Pacific, *The*, 821.
 Page *c.* Donovan, 734.
 Paget *v.* Ede, 229, 559, 854.
 Palmer *v.* Caledonian Railway Co., 245.
 Pardo *v.* Bingham, 706, 712.
 Parken *v.* Royal Exchange Co., 410.
 Parker *v.* Parker, 827.
 Parkinson *v.* Potter, 216, 218, 219, 220.
 Parlement Belge, *The*, 216, 219, 389.
 Part *v.* Scannell, 460.
 Pascal, *Ex parte*, 225, 241, 315, 324, 326.
 Patience, *In re*, 97, 112, 140, 142, 143, 145.
 Patrick *v.* Shedden, 448, 451.
 Patteson *c.* Hunter, 375.
 Pattison *v.* Mills, 656, 657, 659.
 Paul *v.* Roy, 448.
 Pavitt, *In re*, 520.
 Payne *v.* R., 343, 345.
 Peabody *v.* Hamilton (Am.), 241.
 Pearce *v.* Brooks, 34, 36, 595, 862.
 Pearce's Settlement, *In re*, 228, 546.
 Pearson, *In re*, 28, 315.
 Peat's Trusts, *In re*, 548, 553, 557, 558.
 Pechell *v.* Hildersley, 82.
 Pedlar *v.* Johnstone, 167, 198.
 Peillon *v.* Brooking, 568, 686.
 Pélégryn *v.* Coutts & Co., 520, 536.
 Pellegat *v.* Angell, 599.
 Pellin Ferron *v.* Santo Venia (Fr.), 582.
 Pemberton *v.* Hughes, 276, 420, 433, 841.
 Pena Copper Mines, Ltd. *v.* Rio Tinto Co., Ltd., 359, 361.
 Pender's Trustees, 555.
 Peninsular and Oriental Co. *v.* Shand, 609, 614, 626, 627, 628, 860, 861, 864.
 Penn *v.* Baltimore, 223, 228.
 Pepin *v.* Bruyère, 77.
 Perrin *v.* Perrin, 296, 298, 300.
 Pertreis *v.* Tondear, 662, 667, 668, 683.
 Peru (Republic of) *v.* Dreyfus, 234.
 Peruvian Guano Co. *v.* Bockwoldt, 355, 356, 361.
 Peruvian Railway Co., *Re*, 333.
 Peshawur, *The*, 355.
 Phené's Trusts, *In re*, 139.
 Phillips *v.* Hunter, 367, 368.
 Phillips, *In re*, 681.
 ——— *v.* Allan, 480.
 ——— *v.* Batho, 420, 442, 444.

Phillips *v.* Eyre, 34, 38, 233, 245, 247, 452, 478, 479, 694, 696, 697, 698, 703, 704, 705, 769.
 Philpotts *v.* Reed, 483.
 Pick *v.* Stewart, Galbraith & Co., Ltd., 410.
 Picker *v.* London and County Banking Co., 648, 649, 651, 653, 654.
 Piercy, *In re*, 541, 548, 552.
 Pieve Superiore, *The*, 818.
 Pike *v.* Hoare, 223.
 Pitt *v.* Dacre, 548, 557, 558.
 ——— *v.* Pitt, 420, 661, 844.
 Planché *v.* Fletcher, 597.
 Platt *v.* Attorney-General of New South Wales, 98.
 Pledge *v.* Carr, 865.
 Plummer *v.* Woodburne, 446, 448, 451, 455, 456.
 Poingdestre *v.* Poingdestre, 827, 846.
 Poitier *v.* Croza, 218.
 Pollard, *Ex parte*, 228, 546, 854.
 Polydore *v.* Prince, 514.
 Polzeath, *The*, 207.
 Portarlington (Lord) *v.* Soulby, 227.
 Porter *v.* Freudenburg, 173, 811, 812.
 Porto Alexandre, *The*, 216, 219.
 Potinger *v.* Wightman, 75, 127, 130, 131, 134.
 Potter *v.* Brown, 477, 478, 479, 480.
 Pouey *v.* Hordern, 743, 750, 758, 760.
 Power *v.* Whitmore, 446.
 Preston *v.* Melville, 339, 348, 709.
 Price, *In re*, 719, 731, 745, 746, 748, 750, 753, 754, 757.
 ——— *v.* Dewhurst, 441.
 Princess Charlotte, *The*, 821.
 Princess Clementine, 245.
 Princess Thurn and Taxis *v.* Moffitt, 810.
 Pritchard *v.* Norton, 593.
 Pryce, *In re*, 754, 758, 759, 760.

Q.

Quarrier *v.* Colston, 454, 575, 591.
 Queensland, &c. Co., *In re*, 80, 368, 378, 414, 440, 465, 561, 563, 564, 565, 566, 567, 620, 772.
 Queensland Mercantile and Agency Co., Ltd. *v.* Australasian Investment Co., Ltd., 371.
 Quelin *v.* Moisson, 477, 479, 480.

R.

R. S. A., *In re*, 536.
 Rafael *v.* Verelst, 230.
 Raffanel, *In Goods of*, 123.
 Ralli Bros. *v.* Compania Naviera Sota y Aznar, 597, 599, 600.
 Ralli *v.* Dennistoun, 615, 616, 617, 634.
 Ramos *v.* Ramos, 294, 420.

- Ramsay *v.* Ramsay, 303.
 Rankine, *In re* Estate of, 496.
 Ratcliff *v.* Ratcliff, 285, 287, 288.
 Raulin *v.* Fischer, 230.
 Rayment *v.* Rayment, 291, 293, 419, 459.
 Rea, *In re*, 548.
 Redding *v.* Redding, 845.
 Redondo *v.* Chayter, 762.
 Rees *v.* De Bernardy, 589.
 R. *v.* Albany Street Police Station Superintendent, 179.
 — *v.* Allen, 665.
 — *v.* Brampton, 662, 667, 672.
 — *v.* Doutre, 605.
 — *v.* Francis, *Ex parte* Markwald, 194.
 — *v.* Keyn, 72.
 — *v.* Labouchere, 704.
 — *v.* Lesley, 696, 703.
 — *v.* Lynch, 198.
 — *v.* Millis, 669, 670, 685, 783.
 — *v.* Naguib, 289, 789.
 — *v.* Russell, 442, 510.
 — *v.* Speyer, 169, 178, 191.
 — *v.* Superintendent Registrar of Marriages for Hammersmith, *Ex parte* Mir-Anwaruddin, 289, 416, 500, 684, 839, 840.
 — *v.* Topham, 704.
 — *v.* Zulueta, 574.
 Reid, *In Goods of*, 737, 738.
 Reimers *v.* Druce, 445.
 Reiner *v.* Marquis of Salisbury, 225.
 Repeater, *The v.* The Braga, 701.
 Republic of Bolivia Exploration Syndicate, *In re*, 218, 221.
 Republic of Costa Rica *v.* Erlanger, 234.
 Republic of Liberia *v.* Imperial Bank, 234.
 Republic of Peru *v.* Dreyfus, 234.
 Reuss *v.* Bos, 329, 330, 332, 333.
 Ricardo *v.* Garcias, 455, 456.
 Richards *v.* Goad, 854.
 Richardson *v.* Dowdale, 378, 379.
 Riera *v.* Riera, 296.
 Rigel, *The*, 819.
 Risdon Iron and Locomotive Works *v.* Furness, 513.
 Roach *v.* Garvan, 424, 426.
 Roberts, *Ex parte*, 634, 645, 646.
 Roberdean *v.* Rouse, 224.
 Robert Pow, *The*, 819.
 Roberts *v.* Attorney-General (*In re* Johnson), 50, 80, 120, 402, 669, 716, 778, 779, 780.
 — *v.* Brennan, 303.
 — *v.* Knights (Am.), 241, 247.
 Robertson, *Ex parte*, 708.
 — *In re*, 114.
 — *v.* Jackson, 614.
 — *v.* Struth, 444.
 Robinson, *Ex parte*, 324, 327, 328, 475, 476.
 Robinson *v.* Bland, 570, 586, 588, 595, 597, 862.
 — *v.* Currey, 232.
 — *v.* Fenner, 434, 440.
 — *v.* Palmer, 339.
 Robinson & Co. *v.* Continental Insurance Co. of Mannheim, 811.
 Rochefoncauld *v.* Boustead, 764.
 Rodriguez *v.* Speyer Bros., 811.
 Rogers, *Ex parte*, 366.
 — *v.* Frank, 485.
 Rose *v.* Himely, 46.
 Ross *v.* Ross (Am.), 503, 850.
 Rothschild *v.* Currie, 634, 641, 788.
 Rouquette *v.* Overmann, 63, 614, 616, 634, 640, 643, 768.
 Ronsillon *v.* Ronsillon, 48, 50, 56, 57, 393, 398, 400, 401, 405, 412, 450, 452, 453, 594, 597.
 Row *v.* Jagg, *In re* Hoyles, 76, 541, 542, 548.
 Royal Bank of Scotland *v.* Cuthbert (Stein's Case), 365.
 Royal Exchange Assurance Corporation *v.* Sjöforsakrings Vega, 602, 627, 864.
 Rucker, *Ex parte*, 539, 540.
 Rucknaboye *v.* Mottichund, 767.
 Ruding *v.* Smith, 303, 305, 424, 662, 685.
 Rumball *v.* Metropolitan Bank, 648.
 Rush *v.* Rush, 291, 419.
 Russell *v.* Cambefort, 275.
 — *v.* Russell, 296.
 — *v.* Smyth, 51, 396, 397, 452.
 Russell & Co. *v.* Cayzer & Co., 269, 276.
 Rustonjee *v.* The Queen, 215.
 Ryall *v.* Kennedy (Am.), 127, 128, 130, 133.

S.

- Saccharin Corporation *v.* Chemische-Fabrik von Heyden, 99, 163, 166, 244.
 Sadler *v.* Robins, 448, 449, 451.
 Saffery *v.* Mayer, 575.
 St. Gobain, &c. Co. *v.* Hoyermann's Agency, 277.
 St. James' Club, *In re*, 331.
 Salaman *v.* Secretary of State for India, 23.
 — *v.* Tod, 364.
 Samuel *v.* Arrouard (Fr.), 550.
 Sanders, *In Goods of*, 340, 497.
 Sandilands *v.* Innes, 380, 493, 494.
 San Roman, *The*, 624.
 Santa Anna, *The*, 818.
 Santos *v.* Illidge, 36, 505, 562, 588, 591, 786.
 Saul *v.* His Creditors, 581.
 Saunders *v.* Wiel, 232.
 Sawyer *v.* Shute, 686.
 Sawyer *v.* Kropp, 199.
 Saxby *v.* Fulton, 575, 576, 591, 595.
 Scarpetta *v.* Lowenfeld, 440.

- Schaffenius *v.* Goldberg, 810.
 Searth *v.* Bishop of London, 374.
 Schibsbey *v.* Westenholz, 29, 41, 45, 47, 48, 50, 51, 55, 57, 58, 247, 393, 396, 397, 398, 399, 400, 401, 402, 403, 408, 409, 410, 411, 432, 441, 442, 446.
 Schiff, *In Estate of*, 487.
 School Directors *v.* James (Am.), 127, 130, 131.
 Scinde Ry. Co., *Ex parte*, 371, 372, 373.
 Scholefield, *In re*, 731, 754, 755.
 Schulze, *In re*, 810, 811.
 — *v.* Bank of Scotland, 810.
 Schwarz *v.* India Rubber, &c. Co., 668.
 Scotland *v.* South African Territories, Ltd., 812.
 Scott, *In re*, Scott *v.* Scott, 376, 378.
 — *v.* Attorney-General, 308, 309, 418, 419, 447, 468, 469, 503, 843.
 — *v.* Bentley, 535.
 — *v.* Bevan, 660.
 — *v.* Neshitt, 229.
 — *v.* Pilkington, 445, 447, 448, 450, 452, 593, 609, 613, 634.
 — *v.* Royal Wax Candle Co., 511.
 — *v.* Sceales, 729.
 — *v.* Seymour, 247, 694, 696, 699.
 Scrimshire *v.* Scrimshire, 424, 426, 661, 665, 677.
 Seagrove *v.* Parks, 72.
 Seaman, *In re*, 339.
 See Reuter, The, 816.
 Segredo, The, 466, 701.
 Selkirk *v.* Davis, 365, 367, 708.
 Sell *v.* Miller (Am.), 543.
 Selot's Trust, *In re*, 502, 503.
 Sewall *v.* Wilmer (Am.), 740, 755.
 Seward *v.* Vera Cruz, 248.
 Sharp *v.* Taylor, 598.
 Sharpe *v.* Crispin, 126, 127, 132, 152, 153.
 Sharples *v.* Rickard, 634.
 Shaw *v.* Attorney-General, 308, 420.
 — *v.* Gould, 30, 287, 417, 420, 421, 433, 436, 438, 442, 521, 842, 843, 844.
 Shedden *v.* Patrick, 177, 183, 522, 526, 527.
 Sheehy *v.* Professional Life Assurance Co., 440, 449.
 Shepeler *v.* Durant, 811.
 Shephard, *In re*, 664.
 Shields *v.* Shields, 844.
 Ship Marlborough Hill *v.* Cowan & Sons, 818.
 Shrichand *v.* Lacon, 588, 655, 765.
 Sholten, The W. A., 253.
 Sibeth, *Ex parte*, 687.
 Sidaway *v.* Hay, 483.
 Sill *v.* Worswick, 77, 365, 367, 368, 563.
 Simeon *v.* Bazett, 597.
 Simmons *v.* London Joint Stock Bank, 649.
 — *v.* Simmons (N.S.W.), 716, 779.
 Simon *v.* Phillips, 789.
 Simonds *v.* White, 630.
 Simonin *v.* Mallac, 29, 301, 304, 424, 507, 580, 661, 664, 665, 666, 677, 830, 831, 832, 833, 834, 835, 865.
 Simpson, *In re*, 689, 731, 745, 747, 754, 757.
 — *v.* Fogo, 433, 439, 440, 442, 444, 466.
 — *v.* Mirabita, 483.
 Sinclair *v.* Sinclair, 420, 424, 425, 426.
 Sinclair's Divorce Bill, 238, 286, 293.
 Singleton *v.* Roberts, 276.
 Sirdar Gurdial Singh *v.* Rajah of Faridkote, 55, 56, 238, 393, 396, 398, 400, 408, 411, 412, 429.
 Skottowe *v.* Young, 508, 530.
 Slave Grace, The, 502.
 Slingsby *v.* Attorney-General, 308.
 — *v.* Slingsby, 255.
 Sloman *v.* Governor, &c. of New Zealand, 217.
 Smallpage's and Brandon's Cases, 638.
 Smart *v.* Harding, 257.
 Smelting Co. of Australia *v.* Commissioners of Inland Revenue, 346, 491, 571, 586.
 Smith, *Ex parte*, 370.
 — *In Goods of* (1850), 488.
 — *In Goods of* (1868), 486, 487.
 — *In re* (1876), 213, 247, 265.
 — *In re* (1913), 710, 871.
 — *In re E. R.*, 144, 158.
 — *In re* (1916), Lawrence *v.* Kitson, 226, 546, 572, 854.
 — *v.* Buchanan, 480.
 — *v.* Gould, 789.
 — *v.* Lucas, 580.
 — *v.* McClure, 632.
 — *v.* Maxwell, 661.
 — *v.* Nicolls, 454, 456.
 — *v.* Weguelin, 239.
 Smyth, *In re*, 343, 346.
 Société Anonyme des Anciens Etablissements Panhard et Levassor *v.* Panhard Levassor Motor Company, 511.
 Société Générale de Paris *v.* Dreyfus Bros., 253, 455.
 Société des Hôtels Réunis *v.* Hawker, 34, 595, 785.
 Solomons *v.* Ross, 473, 476.
 Soltykoff, *In re*, 536, 583.
 Somerville *v.* Somerville, 99, 100, 106, 108, 127, 136, 141, 143, 145, 159, 716.
 Somes, *Re*, 365.
 Sommersett's Case, 34, 502.
 Sottomaior, *In re*, 534.
 Sottomayor *v.* De Barros (No. 1), 294, 301, 501, 506, 507, 577, 578, 579, 581, 661, 663, 664, 666, 674, 678, 679, 681, 682, 683, 783, 830, 831, 832, 833, 834, 865, 866.
 Sottomayor *v.* De Barros (No. 2), 578, 579, 580, 661, 663, 678, 683, 684, 783, 830, 831, 839.
 South African Breweries, Ltd. *v.* King, 602, 608, 610.

- South African Republic *v.* La Compagnie Franco-Belge du Chemin de Fer du Nord, 221, 222, 235.
 South Eastern of Portugal Railway Co., *In re*, 368.
 Spain (King of) *v.* Hullet, 234.
 Sparenburgh *v.* Bannatyne, 810.
 Speckhart *v.* Campbell, 266.
 Speller *v.* Bristol Co., 270, 279.
 Spiller *v.* Turner, 230, 601, 617.
 Spratt *v.* Harris, 348.
 Sproule *v.* Hopkins, 301, 304.
 Sprowle *v.* Legge, 613.
 Spurrier *v.* La Cloche, 572, 592, 602, 860, 861.
 Spurway *v.* Spurway, 144.
 Stahlwerk, & Co., *In re*, 811.
 Stanley *v.* Bernes, 148, 716, 734.
 Stapleton *v.* Conway, 655.
 Statham *v.* Statham, 216.
 Stathatos *v.* Stathatos, 135, 294, 295, 665, 826 *et seq.*, 834, 838, 866.
 Stavert *v.* Stavert, 420, 844.
 Steel *v.* Steel, 115.
 Steele *v.* Braddell, 664.
 Steer, *In re*, 118, 123, 158.
 Steigerwald, *Re*, 487.
 Stein's Case, Royal Bank of Scotland *v.* Cuthbert, 365.
 Stephens *v.* McFarland, 136, 580.
 Stepney Election Petition, *In re*, Isaacson *v.* Durant, 170, 184, 197.
 Stern *v.* R., 344.
 Stettin, The, 622.
 Stevensen *v.* Masson, 143.
 Stevenson & Sons *v.* Aktiengesellschaft, & Co., 811.
 Stewart, *Re*, 487.
 ——— *v.* Auld, 367.
 ——— *v.* Bank of England, 217.
 Stirling, *In re*, Stirling *v.* Stirling, 418, 423, 468, 521, 843.
 Stirling Maxwell *v.* Cartwright, 375, 379.
 Stoddart, *In Goods of*, 736, 738.
 Stoeck *v.* Public Trustee, 168, 199.
 Stokes, *In re*, 541.
 Strauss *v.* Platt, 595.
 Stringer *v.* English, & Co. Insurance Co., 467, 570.
 Strousberg *v.* Republic of Costa Rica, 222, 239.
 Stuart *v.* Bute, 509, 517, 518, 519.
 Stubbings *v.* Clunies Ross, 341.
 Studd *v.* Cook, 61.
 Suarez *v.* Suarez, 217, 218, 220, 221.
 Submarine Telegraph Co. *v.* Dickson, 247, 700.
 Sudeley *v.* Attorney-General, 343, 346, 350.
 Suevic, The, 820.
 Surrey *v.* Perrin, *In re* Bonnefoi, 354, 356, 486, 715.
 Suse *v.* Pompe, 634, 644, 646.
 Sussex Peerage Case, The, 573, 574, 676.
 Sutherland, *In re* Mary Duchess of, 812.
 Swaagman *v.* Swaagman, 687.
 Swansea Shipping Co. *v.* Duncan, 279.
 Swift *v.* Kelly, 661, 665, 666, 678.
 Swift *v.* Attorney-General for Ireland, 574.
 Sydney Municipal Council *v.* Bull, 228, 230, 233, 453.
 Sylph, The, 819.
 Symons *v.* May, 480.
 Syrian Ottoman Railway Co., *In re*, 332.
 T.
 Tagus, The, 765.
 Talca, The, 816.
 Tamplin, *In re*, 339.
 Tarleton *v.* Tarleton, 447.
 Tassell *v.* Hallen, 213, 253, 256, 258, 268.
 Tatam *v.* Reeve, 575.
 Tatnall *v.* Hankey, 744, 745.
 Tayler *v.* Caryl (Am.), 817.
 Taylor *v.* Barclay, 215, 594.
 ——— *v.* Best, 216, 217, 218, 219, 220, 221.
 ——— *v.* Caldwell, 855.
 ——— *v.* Crowland Gas Co., 164.
 ——— *v.* Holland, 456, 457, 480.
 Tergeste, The, 283.
 Thames and Mersey Insurance Co. *v.* Societa di Navigazione, 244.
 Tharsis Sulphur Co. *v.* La Société des Métaux, 235, 237.
 Theta, The, 819.
 Thiery *v.* Chalmers, Guthrie & Co., 536.
 Thomas *v.* Acklam, 197.
 ——— *v.* The Queen, 215.
 Thompson *v.* Barclay, 594.
 ——— *v.* Gill, 458.
 ——— *v.* Pewles, 655.
 ——— *v.* Reynolds, 338.
 Thorburn *v.* Merlin, 746.
 Thornton *v.* Curling, 721, 723, 724, 725.
 ——— *v.* Thornton, 357.
 Three Spanish Sailors, The, 810.
 Thurburn *v.* Steward, 693, 706, 708.
 Tingley *v.* Müller, 811.
 Tobin *v.* The Queen, 215.
 Tolla, The, 821.
 Tollemache *v.* Tollemache, 420, 421.
 Toller *v.* Carteret, 227.
 Tommi, The, 821.
 Tootal's Trusts, *In re*, 31, 88, 92, 384, 782, 797.
 Toronto General Trust Corporation *v.* The King, 343, 345, 348.
 Torrey Grant, *In Goods of* (Egypt), 552, 781.
 Tottenham *v.* Barry, 253.
 Tourton *v.* Flower, 485, 486.
 Tovey *v.* Lindsey, 286, 824, 841.
 Tezier *v.* Hawkins, 266.
 Trafford *v.* Blanc, *In re* Trufort, 120, 413, 427, 428, 445, 446, 469, 470, 486.

Trétond, In Goods of, 745.
 Trent Cycle Co. *v.* Beattie, 251.
 Trimbe *v.* Vignier, 583, 634, 641.
 Trinidad Shipping Co. *v.* Alston, 588,
 597, 599, 600, 602, 861.
 Trotter *v.* Trotter, 873, 874, 876.
 Trufort, *In re*, 120, 413, 427, 428, 445,
 446, 469, 470, 486, 714, 720, 772, 774,
 776.
 Tucker, In Goods of, 339, 341, 349, 351.
 Tulloch *v.* Hartley, 228, 229.
 Turnbull *v.* Walker, 387, 397, 407.
 Turner *v.* Thompson, 285, 424, 426.
 ——— *v.* Turner, 285.
 Two Ellens, The, 821.
 Twycross *v.* Dreyfus, 217, 239, 650.
 Twyford *v.* Trail, 493, 495.
 Tyler *v.* Bell, 380.

U.

Udny *v.* Udny, 98, 99, 106, 107, 108,
 109, 111, 113, 115, 116, 117, 121, 123,
 125, 128, 143, 144, 150, 153, 158, 161,
 501, 506, 521, 523, 525, 526, 578, 794,
 795, 797, 850.
 Uhlig *v.* Uhlig, 288, 810.
 Ullee, *In re*, 290, 532.
 Underhill *v.* Hernandez (Am.), 562.
 Union Electric Co., Ltd. *v.* Holman &
 Co., 410.
 United States *v.* McRae, 763.
 ——— *v.* Prioleau, 234.
 ——— *v.* Wagner, 234.
 Upfill *v.* Wright, 595.
 Urquhart, *In re*, 251, 322.
 ——— *v.* Butterfield, 106, 109, 113,
 128, 136, 147, 152.
 Usparicha *v.* Noble, 810.
 Utterton *v.* Tewsh, 843.

V.

Vadala *v.* Lawes, 30, 433, 435, 436,
 438, 454.
 Vallée *v.* Dumergue, 394, 405, 406.
 Van Grutten *v.* Digby, 587, 686.
 Vannini, In Goods of, 745.
 Vanquelin *v.* Bouard, 388, 430, 433,
 489, 491.
 Vardopulo *v.* Vardopulo, 358, 416.
 Vaucher *v.* Solicitor to Treasury (*In*
re Grove), 106, 109, 117, 147, 521,
 522, 523, 524, 527, 717.
 Vavasour *v.* Krupp, 217.
 Vecht *v.* Taylor, 199.
 Vera Cruz, The, 284, 819.
 Victoria Society, Knottingley, *In re*,
 331.
 Vidity *v.* O'Hagan, 577, 580, 588, 686,
 866.
 Viesca *v.* D'Aramburu, 487.
 Vivar, The, 213, 265.

Voinet *v.* Barrett, 394, 403, 404, 409.
 Volkl *v.* Rotunda Hospital, 810.
 Volturmo, The, 660.
 Von Brentano, *In re* Estate of, 375,
 542, 551.
 Von Buseck, In Goods of, 208, 726.
 Von Eckhardstein *v.* Von Eckhardstein,
 357.
 Von Hellfeld *v.* Rechnitzer, 267, 276,
 511.
 Von Linden, In Goods of, 486.

W.

Waddington *v.* Waddington, 293.
 Wadsworth *v.* Queen of Spain, 216,
 218.
 Waite *v.* Bingley, 473, 475, 553.
 Walcot *v.* Botfield, 112.
 Waldegrave Peerage Case, The, 662,
 672.
 Walker, *In re* (1871), 139.
 ——— *In re* (1908), 744, 745, 751.
 ——— *v.* Walker, 416.
 Wansborough Paper Co. *v.* Laughland,
 237, 262.
 Wardell *v.* Wardell, 291.
 Warrand, *In re*, 358.
 Warrender *v.* Warrender, 134, 135, 137,
 290, 615, 665, 676, 824, 832, 840, 842,
 843, 844.
 Warter *v.* Warter, 468, 469.
 Washburn, &c. Co. *v.* Cunard Co. and
 Parkes, 269, 270.
 Wataga, The, 821.
 Waterhouse *v.* Stansfield, 550, 618, 619.
 Watkins *v.* Scottish Imperial Insur-
 ance Co., 163, 164, 165, 265.
 Watson, *In re* (1887), 556.
 ——— *In re* (1893), 458.
 ——— *v.* Daily Record, 266.
 Watts *v.* Shrimpton, 686, 689.
 Wauchope *v.* Wauchope, 160, 797.
 Wavertree Sailing Ship Co. *v.* Love,
 630.
 Waygood & Co. *v.* Bennie, 267.
 Waymell *v.* Reed, 597.
 Weatherby *v.* St. Giorgio, 714.
 Weaver, In Goods of, 487.
 Weber, *Ex parte*, 168, 810.
 Wedderburn *v.* Wedderburn, 360.
 Welch *v.* Tennent, 553, 690.
 Wells *v.* Williams, 234, 810.
 Wernher's Will, *In re*, Wernher *v.*
 Beit, 743, 759.
 West *v.* Sackville, 255.
 West Cumberland Iron and Steel Co.,
In re, 373.
 Westergaard *v.* Westergaard, 468.
 Westerman *v.* Schwab, 737, 739, 757.
 Western, &c. Building Society *v.* Ruck-
 lidge, 250, 251.
 Western Bank of New York *v.* Perez,
 245, 276.
 Westman *v.* Aktiebolaget, &c., 234, 511.

- Whicker *v.* Hume, 83, 721, 724, 794, 797.
 Whitaker *v.* Forbes, 225.
 White, *In re*, 811.
 ——— *v.* Briggs, 708.
 ——— *v.* Duvernay, 520.
 ——— *v.* Hall, 224, 229.
 ——— *v.* Howard (Am.), 131.
 ——— *v.* North, 647.
 Whitelegg, *In Goods of*, 486.
 Whyte *v.* Rose, 374, 376, 378, 381, 489, 490, 492.
 Wiedemann *v.* Walpole, 766.
 Wild Ranger, *The*, 702.
 Wilde *v.* Sheridan, 641.
 Wilding *v.* Bean, 251.
 Wilkie *v.* Cathcart, 369.
 Wilkinson's Settlement, *In re*, 731, 745, 747, 754.
 Wilkinson *v.* Gibson, 841.
 Willans *v.* Ayers, 634, 644.
 Willem III., *The*, 819, 820.
 Williams *v.* Bruffy (Am.), 562.
 ——— *v.* Cartwright, 253, 268, 269, 270.
 ——— *v.* Colonial Bank, 563, 566, 654.
 ——— *v.* Dormer, 302.
 ——— *v.* Jones, 51, 396, 397.
 ——— *v.* Williams, 686.
 Willoughby, *In re*, 178, 520, 781.
 Wilson, *Ex parte*, 367, 708.
 ——— *In re*, 811.
 ——— *v.* Dunsany, 709, 711.
 ——— *v.* Wilson, 144, 285, 287, 288, 292, 422, 832.
 Winans *v.* Attorney-General, 116, 117, 121, 141, 145, 155.
 ——— *v.* Attorney-General (No. 2), 343, 345.
 ——— *v.* The King, 344.
 Winchelsea *v.* Garett, 871.
 Windsor and Annapolis Ry. Co. *v.* The Queen, 215.
 Winter, *In re*, 348.
 ——— *v.* Winter, 261, 262.
 Wisconsin *v.* Pelican Company (Am.), 230, 231, 232, 452, 453.
 Witted *v.* Galbraith, 268.
 Wolff *v.* Oxholm, 503.
 Wood *v.* Middleton, 253, 261, 353.
 Woods *v.* McInnes, 253.
 Woolley *v.* Clark, 338.
 Worcester, &c. Banking Co. *v.* Firbank, 275, 276, 277, 278.
 Worms *v.* De Valdor, 234, 502, 503.
 Wotherspoon *v.* Conolly, 459, 460.
 Wright's Trusts, *Re*, 106, 108, 510, 521, 522, 524, 525, 526.
 Wyckoff's Case, 343, 349.
 Wynne *v.* Callender, 576.
 ——— *v.* Jackson, 634, 639.

Y.

- Yelverton *v.* Yelverton, 135, 137, 158, 287, 299.
 Yorkshire Tannery *v.* Eglinton Chemical Co., 221, 235, 236, 268, 271.
 Young *v.* S.S. Scotia, 215, 219.
 Yzquierdo *v.* Clydebank Engineering, &c. Co., 234.

Z.

- Zeta, *The*, 819.
 Zollverein, *The*, 701, 702.
 Zycklinski *v.* Zycklinski, 235, 236.

TABLE OF PRINCIPLES AND RULES.

INTRODUCTION.

GENERAL PRINCIPLES.

Jurisdiction and Choice of Law.

GENERAL PRINCIPLE No. 1.—Any right which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised by English Courts. (p. 23.)

GENERAL PRINCIPLE No. II.—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country—

(A) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation;

(B) Where the enforcement of such right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political institutions;

(C) Where the enforcement of such right involves interference with the authority of a foreign sovereign within the country; whereof he is sovereign. (p. 34.)

Jurisdiction.

GENERAL PRINCIPLE No. III.—The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i.e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i.e.*, has no right to adjudicate upon) any matter with regard to which he cannot give an effective judgment. (p. 40.)

SUB-RULE.—When with regard to any matter (*e.g.*, divorce) the Courts of no one country can give a completely effective judgment,

but the Courts of several countries can give a more or less effective judgment, the Courts of that country where the most effective judgment can be given have a preferential jurisdiction. (p. 43.)

GENERAL PRINCIPLE No. IV.—The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction, or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction. (p. 44.)

Choice of Law.

GENERAL PRINCIPLE No. V.—The nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired. (p. 59.)

GENERAL PRINCIPLE No. VI.—Whenever the legal effect of any transaction depends upon the intention of the party or parties thereto, as to the law by which it was governed, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties. (p. 60.)

BOOK I.

PRELIMINARY MATTERS.

CHAPTER I.

INTERPRETATION OF TERMS.

I. GENERAL DEFINITIONS.

IN the following Rules and Exceptions, unless the context or subject-matter otherwise requires, the following terms have the following meanings.

1. "This Digest" means the Rules and Exceptions contained in Books I. to III. of this treatise.

2. "Court" means His Majesty's High Court of Justice in England.

3. "Person" includes a corporation or body corporate.

4. "Country" means the whole of a territory subject under one sovereign to one system of law.

5. "State" means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign.

6. "Foreign" means not English.

7. "Foreign country" means any country which is not England.

8. "England" means the territory of England, including the Principality of Wales and the town of Berwick-on-Tweed, and includes any ship of the Royal Navy wherever situate.

9. "United Kingdom" means the United Kingdom of Great Britain (England and Scotland) and Ireland, the islands and the territorial waters adjacent thereto; but does not include either the Isle of Man or the Channel Islands.

10. "British dominions" means all countries subject to the Crown, including the United Kingdom, and the territorial waters adjacent thereto.

11. "Domicil" means the country which in accordance with the

Rules in this Digest is considered by English law to be a person permanent home.

12. "Independent person" means a person who as regards his domicile is not legally dependent, or liable to be legally dependent upon the will of another person.

13. "Dependent person" means any person who is not a independent person as hereinbefore defined, and includes:

- (i) a minor;
- (ii) a married woman.

14. "An immovable" means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real.

15. "A movable" means a thing which is not an immovable and includes:

- (i) a thing which can be touched and can be moved, and
- (ii) a thing which is the object of a claim, and cannot be touched, or, in other words, a *chose in action*.

16. "*Lex domicilii*," or "law of the domicile," means the law of the country where a person is domiciled.

17. "*Lex loci contractus*" means the law of the country where a contract is made.

18. "*Lex loci solutionis*" means the law of the country where contract is to be performed.

19. "*Lex situs*" means the law of the country where a thing is situate.

20. "*Lex fori*" means the local or territorial law of the country to which a Court, wherein an action is brought, or other legal proceeding is taken, belongs. (p. 67.)

II. APPLICATION OF TERM "LAW OF COUNTRY."

In this Digest the law of a given country (*e.g.*, the law of the country where a person is domiciled)

- (i) means, when applied to England, the local or territorial law of England;
- (ii) means, when applied to any foreign country, any law whether it be the local or territorial law of that country or not, which the Courts of that country apply to the decision of the case to which the Rule refers. (p. 79.)

CHAPTER II.

DOMICIL.

(A) DOMICIL OF NATURAL PERSONS.

I. NATURE OF DOMICIL.

RULE 1.—The domicile of any person is the place or country which is considered by English law to be his permanent home.

This is—

- (1) in general, the place or country which is in fact his permanent home;
- (2) in some cases, the place or country which, whether it be in fact his home or not, is determined to be so by a rule of English law. (p. 83.)

RULE 2.—No person can at any time be without a domicile. (p. 98.)

RULE 3.—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile (?). (p. 99.)

Exception.—A person within the operation of the Domicile Act, 1861, 24 & 25 Vict. c. 121, may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes. (p. 102.)

RULE 4.—A domicile once acquired is retained until it is changed

- (1) in the case of an independent person, by his own act;
- (2) in the case of a dependent person, by the act of someone on whom he is dependent. (p. 103.)

II. ACQUISITION AND CHANGE OF DOMICIL.

Domicil of Independent Persons.

RULE 5.—Every independent person has at any given moment either

- (1) the domicile received by him at his birth (which domicile is hereinafter called the domicile of origin), or,
- (2) a domicile (not being the same as his domicile of origin) acquired or retained by him while independent by his own act (which domicile is hereinafter called a domicile of choice). (p. 104.)

Domicil of Origin.

RULE 6.—Every person receives at (or as from) birth a domicil of origin.

- (1) In the case of a legitimate child born during his father's lifetime, the domicil of origin of the child is the domicil of the father at the time of the child's birth.
- (2) In the case of an illegitimate, or posthumous, or legitimated child, the domicil of origin is the domicil of his mother at the time of his birth.
- (3) In the case of a foundling, the domicil of origin is the country where he is born or found. (p. 106.)

Domicil of Choice.

RULE 7.—Every independent person can acquire a domicil of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise. (p. 109.)

Change of Domicil.

RULE 8.

- (1) The domicil of origin is retained until a domicil of choice is in fact acquired.
- (2) A domicil of choice is retained until it is abandoned, whereupon either
 - (i) a new domicil of choice is acquired; or
 - (ii) the domicil of origin is resumed. (p. 121.)

Domicil of Dependent Persons (Minors and Married Women).

RULE 9.—The domicil of every dependent person is the same as, and changes (if at all) with, the domicil of the person on whom he is, as regards his domicil, legally dependent. (p. 126.)

SUB-RULE 1.—Subject to the exceptions hereinafter mentioned, the domicil of a minor is during minority determined as follows:—

- (1) The domicil of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicil of his father.
- (2) The domicil of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicil of the mother (?).

- (3) The domicile of a minor without living parents, or of an illegitimate minor without a living mother, possibly is the same as, and changes with, the domicile of his guardian, or may be changed by his guardian (?). (p. 127.)

Exception 1 to Sub-Rule 1.—The domicile of a minor is not changed by the mere re-marriage of his mother. (p. 133.)

Exception 2 to Sub-Rule 1.—The change of a minor's home by a mother or a guardian does not, if made with a fraudulent purpose, change the minor's domicile. (p. 134.)

SUB-RULE 2.—The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband. (p. 134.)

RULE 10.—A domicile cannot be acquired by a dependent person through his own act. (p. 136.)

SUB-RULE.—Where there is no person capable of changing a minor's domicile, he retains, until the termination of his minority, the last domicile which he has received. (p. 137.)

RULE 11.—The last domicile which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act. (p. 137.)

SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during his minority until he changes it. (p. 138.)

SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it. (p. 138.)

SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of divorce, until she changes it. (p. 138.)

III. ASCERTAINMENT OF DOMICIL.

Domicil—How Ascertained.

RULE 12.—The domicile of a person can always be ascertained by means of either

- (1) a legal presumption; or
- (2) the known facts of the case. (p. 139.)

Legal Presumptions.

RULE 13.—A person's presence in a country is presumptive evidence of domicile. (p. 140.)

RULE 14.—When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile. (p. 141.)

Facts which are Evidence of Domicil.

RULE 15.—Any circumstance may be evidence of domicile, which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country. (p. 142.)

RULE 16.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicile. (p. 144.)

RULE 17.—Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*), and in so far evidence of domicile. (p. 145.)

RULE 18.—Residence in a country is not even *prima facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*animus manendi*). (p. 147.)

(B) DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

RULE 19.—The domicile of a corporation is the place considered by law to be the centre of its affairs, which

- (1) in the case of a trading corporation, is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on;
- (2) in the case of any other corporation, is the place where its functions are discharged. (p. 163.)

CHAPTER III.

BRITISH NATIONALITY AND STATUS OF ALIENS.

(A) DEFINITIONS.

RULE 20.

- (1) "British subject" means any natural person who owes permanent allegiance to the Crown.
- (2) "Disability" means the status of being a married woman, a minor, lunatic, or idiot.

- (3) "Declaration of alienage" means a declaration of a person's desire to be an alien made under the terms of the British Nationality and Status of Aliens Act, 1914.
- (4) "Foreign" and "foreigner" are throughout this Chapter used as meaning "not British," whereas in general throughout this Digest they mean "not English."
- (5) "Alien" means any person who is not a British subject. (p. 167.)

RULE 21.

- (1) Every natural person is either a British subject or an alien.
- (2) A British subject must be either
 - (a) a person who is or becomes a British subject on and from the day of his birth, and is called a natural-born British subject, or
 - (b) a person who becomes a British subject at some day later than the day of his birth, *i.e.*, who is not a natural-born British subject. (p. 168.)

(B) ACQUISITION OF BRITISH NATIONALITY.

(A) NATIONALITY ACQUIRED AT AND FROM DATE OF PERSON'S BIRTH.

RULE 22.—Subject to the effect of the exceptions hereinafter mentioned, any person born within the British dominions is a natural-born British subject. (p. 169.)

Exception 1.—Any person whose father (being an alien) is at the time of such person's birth a foreign sovereign, or an ambassador, or other diplomatic agent accredited to the British Government by the government of a foreign State, is (though born within the British dominions) an alien. (p. 171.)

Exception 2.—Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien. (p. 172.)

Exception 3.—Any person born in the British dominions while his father, an alien enemy, is imprisoned as a prisoner of war, or interned, as a matter of precaution, in any part of

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the British dominions or in an allied country, is (*semble*) an alien. (p. 172.)

SUB-RULE.

- (1) Any person born on board a British ship, whether in foreign territorial waters or not, is a natural-born British subject.
- (2) Any person born on board a foreign ship is not, by reason only that the ship was in British territorial waters at the time of such person's birth, a British subject.

In this Sub-Rule—

“British ship” means either a ship belonging to the Royal Navy, or a ship owned wholly by British subjects.

“Foreign ship” means a ship which is not a British ship.

“Territorial waters” includes any port, harbour, or dock. (p. 173.)

RULE 23.—Subject to the exceptional cases enumerated in Rule 24, no person who is born out of the British dominions is a natural-born British subject. (p. 175.)

RULE 24.—Any person, though born out of the British dominions, is a natural-born British subject if his father, at the time of such person's birth, was a British subject, and

(*Case 1*), was born within the British dominions, or

(*Case 2*), was born whether before or after August 7th, 1914, in a place where the King exercises extra-territorial jurisdiction over British subjects, or

(*Case 3*), was a naturalized British subject, or

(*Case 4*), had become a British subject by annexation of territory, or

(*Case 5*), was in the service of the Crown. (p. 176.)

RULE 25.

- (1) British nationality cannot be inherited through a woman.
- (2) British nationality cannot be transmitted by inheritance for more than one generation.
- (3) British nationality cannot be transmitted by inheritance to any person not actually born during his father's lifetime (posthumous child). (p. 181.)

(B) NATIONALITY ACQUIRED LATER THAN DATE OF PERSON'S BIRTH.

I. BY PERSON NOT UNDER DISABILITY.

(1) *Annexation.*

RULE 26.—On the acquisition of territory by the Crown, whether by annexation or cession, all persons, nationals of the annexed or cessionary State, resident in the territory annexed or ceded, become British subjects, unless other provision is made in the instrument of annexation or cession. (p. 183.)

(2) *Marriage.*

RULE 27.—An alien woman who marries a British subject shall be deemed to be a British subject, and shall not, by reason only, of the death of her husband or the dissolution of her marriage, cease to be a British subject. (p. 184.)

(3) *Naturalization.*

RULE 28.—(1) A Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State

- (a) that he has either resided in the British dominions for a period of not less than five years in the manner required by this Rule, or been in the service of the Crown for not less than five years within the last eight years before the application; and
- (b) that he is of good character and has an adequate knowledge of the English language; and
- (c) that he intends if his application is granted either to reside in the British dominions, or to enter or continue in the service of the Crown.

(2) The residence required by this Rule is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of the British dominions, for a period of four years within the last eight years before the application.

(3) The grant of a certificate of naturalization to any such alien shall be in the absolute discretion of the Secretary of State,

and he may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision.

(4) A certificate of naturalization shall not take effect until the applicant has taken the oath of allegiance.

(5) In the case of a woman who was a British subject previous to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the requirements of this Rule as to residence shall not apply, and the Secretary of State may in any other special case, if he thinks fit, grant a certificate of naturalization, although the four years' residence or five years' service has not been within the last eight years before the application.

(6) For the purposes of this Rule a period spent in the service of the Crown may, if the Secretary of State thinks fit, be treated as equivalent to a period of residence in the United Kingdom. (p. 185.)

RULE 29.—The Secretary of State may, in his absolute discretion, in such cases as he thinks fit, grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in this certificate that the grant thereof is made for the purpose of quieting doubt as to the right of the person to be a British subject, and the grant of such a special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject. (p. 189.)

RULE 30.—An alien who has been naturalized before the passing of the British Nationality and Status of Aliens Act, 1914, may apply to the Secretary of State for a certificate of naturalization under that Act, and the Secretary of State may grant to him a certificate on such terms and conditions as he may think fit. (p. 189.)

RULE 31.—A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of the Rules in this Chapter, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, duties, and liabilities to which a natural-born British subject is entitled or subject, and as from the date of his naturalization have to all intents and purposes the status of a natural-born British subject. (p. 190.)

RULE 32.—The status of a natural-born British subject

differs from the status of a naturalized British subject in two characteristics:—

- (1) The acquisition of the status of a natural-born British subject depends upon circumstances absolutely independent of the assent of the government, whereas the acquisition of the status of a naturalized British subject does depend on the assent thereto of the government.
- (2) There exists under English law (subject to the effect of Rule 46, *post*) no power on the part of the government to deprive a natural-born British subject of his British nationality, but there does exist under the British Nationality and Status of Aliens Act, 1914, a power on the part of the government to deprive a naturalized British subject of his British nationality on account of his having committed certain offences. (p. 191.)

RULE 33.—(1) A certificate granted under Rules 28 to 30 of this Digest creates (subject to the effect of clause 3 of this Rule) on behalf of the applicant imperial naturalization, *i.e.*, naturalization which is valid throughout the whole of the British Empire.

(2) The government of any British possession has (subject to the effect of clause 3 of this Rule) the same power to grant or revoke a certificate of imperial naturalization as has the Secretary of State under Rules 28 to 30, but in the case of any British possession, other than India, or a self-governing dominion, the power must be exercised with the sanction of the Secretary of State.

(3) A certificate of naturalization granted under Rules 28 to 30 has no effect within any one of the five self-governing Dominions unless the legislature of such Dominion adopts Part II. of the British Nationality and Status of Aliens Act, 1914. (p. 193.)

Rule 34.—Any person may be naturalized under a special Naturalization Act. (p. 194.)

II. BY PERSON UNDER DISABILITY.

(1) *Annexation.*

RULE 35.—If on the acquisition of territory by the Crown, whether by annexation or cession, a national of the annexed or cessionary State becomes by virtue of the annexation or cession a British subject, every child of such person, being a minor, shall (*semble*) become a British subject. (p. 195.)

(2) *Naturalization.*

RULE 36.—(1) Where an alien obtains a certificate of naturalization the Secretary of State may, if he thinks fit, on the application of that alien, include in the certificate the name of any child of the alien born before the date of the certificate and being a minor, and that child shall thereupon, if not already a British subject, become a British subject.

(2) The Secretary of State may, in his absolute discretion in any special case in which he thinks fit, grant a certificate of naturalization to any minor, whether or not the conditions required by the British Nationality and Status of Aliens Act, 1914, have been complied with.

(3) Except as provided in this Rule and in Rule 49, a certificate of naturalization shall not be granted to any person under disability. (p. 195.)

(3) *Marriage.*

RULE 37.—The provisions of Rule 27 as to the acquisition of British nationality by marriage apply to minor children in the same manner as to persons not under disability. (p. 196.)

(C) LOSS OF BRITISH NATIONALITY.

I. BY PERSON NOT UNDER DISABILITY.

(1) *Annexation to Foreign State.*

RULE 38.—On the annexation by, or cession to, a foreign power of British territory, British subjects resident in that territory become aliens, so far as provision regarding their nationality is not made by treaty. (p. 197.)

(2) *Marriage.*

RULE 39.—A British subject who becomes the wife of an alien (1) shall be deemed to be an alien, and (2) shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be an alien. (p. 197.)

(3) *Naturalization in Foreign Country.*

RULE 40.—A British subject who, when in any foreign State and not under disability, by obtaining a certificate of naturaliza-

tion, or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject. (p. 198.)

(4) *Declaration of Alienage.*

RULE 41.—(1) Any person who by reason of his having been born within the British dominions is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may, if not under any disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.

(2) Any person who, though born out of the British dominions, is a natural-born British subject may, if not under any disability, make a declaration of alienage, and on making such declaration shall cease to be a British subject. (p. 199.)

RULE 42.—Where His Majesty has entered into a convention with any foreign State to the effect that the subjects or citizens of that State to whom certificates of naturalization have been granted, may divest themselves of their status as such subjects, it shall be lawful for His Majesty, by Order in Council, to declare that the convention has been entered into by His Majesty; and from and after the date of the Order any person having been originally a subject or citizen of the State therein referred to, who has been naturalized as a British subject may, within the limit of time provided in the convention, make a declaration of alienage, and on his making the declaration he shall be regarded as an alien and as a subject of the State to which he originally belonged as aforesaid. (p. 200.)

RULE 43.—The child of a naturalized alien who has become a British subject through the inclusion of his name in the certificate granted to his parent, may within one year after attaining his majority make a declaration of alienage, and shall thereupon cease to be a British subject. (p. 200.)

(5) *Revocation of Naturalization.*

RULE 44.—A Secretary of State is bound to revoke a certificate of naturalization where he is satisfied that the certificate was obtained by false representation or fraud, or by concealment of material circumstances, or that the person to whom the certificate was granted has shown himself by act or speech to be disaffected

or disloyal to the Crown; he is also bound to revoke the certificate in certain other cases specified in the British Nationality and Status of Aliens Act, 1914, s. 7, if satisfied that the continuance of the certificate is not conducive to the public good. In every case the Secretary of State may, and in most cases, if so desired by the person in question, must refer the matter to a committee of inquiry presided over by a person who holds or has held high judicial office or to the High Court. The decision as to revocation, however, rests with the Secretary of State alone, save in the case of a certificate of Imperial naturalization granted by the government of some other part of the British dominions, in which event the concurrence of the government by which the certificate was granted is necessary for the revocation of the certificate.

Similar powers as to the revocation of Imperial certificates of naturalization are vested in the governments of British possessions, the concurrence of the Secretary of State being requisite for the revocation of any certificate granted in the United Kingdom. (p. 201.)

II. BY PERSON UNDER DISABILITY.

RULE 45.—Subject to the Exception to this Rule, and to Rule 47, where a person being a British subject ceases to be a British subject, whether by declaration of alienage or otherwise, every child of that person, being a minor, shall thereupon cease to be a British subject, unless such child, on the person ceasing to be a British subject, does not become by the law of any other country naturalized in that country. (p. 202.)

Exception.—Where a widow being a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside the British dominions or not. (p. 203.)

RULE 46.—(1) Where a certificate of naturalization is revoked, the Secretary of State may by order direct that the wife and minor children (or any of them) of the person whose certificate is revoked shall cease to be British subjects, and any such person shall thereupon become an alien, but no such order shall be made in the case of a wife who was at birth a British subject unless the Secretary of State is satisfied that if she had held a certificate of naturalization in her own right the certificate could properly have been revoked.

(2) Except where such an order is made, the wife and minor children of the person whose certificate is revoked shall not be affected by the revocation, and they shall remain British subjects.

(3) The wife of any such person may, within six months after the date of the order of revocation, make a declaration of alienage, and thereupon she and any minor children of her husband and herself shall cease to be British subjects and shall become aliens. (p. 203.)

RULE 47.—When a man ceases during the continuance of his marriage to be a British subject, his wife shall thereupon cease to be a British subject, but it shall be lawful for her to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject. (p. 204.)

(D) RESUMPTION OF BRITISH NATIONALITY.

RULE 48.—Any child who has ceased to be a British subject under the terms of Rule 45 may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality, and shall thereupon again become a British subject. (p. 205.)

RULE 49.—Where an alien is the subject of a State at war with the British Crown, it shall be lawful for his wife, if she was a natural-born British subject, to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State, if he is satisfied that it is desirable that she may be permitted to do so, may grant her a certificate of naturalization. (p. 205.)

RULE 50.—British nationality duly acquired under the law in force prior to January 1st, 1915, is not affected by the changes in the law as to the acquisition of such nationality introduced by the British Nationality and Status of Aliens Act, 1914. (p. 206.)

(E) STATUS OF ALIENS.

RULE 51.—Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to, an alien in the same manner in all respects as through, from, or in succession to, a natural-born British subject:

Provided that this Rule shall not operate so as to

- (1) confer any right on an alien to hold real property situated out of the United Kingdom; or
 - (2) qualify an alien for any office or for any municipal, parliamentary, or other franchise; or
 - (3) qualify an alien to be the owner of a British ship; or
 - (4) entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him; or
 - (5) affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before May 12th, 1870, or in pursuance of any devolution by law on the death of any person dying before that day.
- (p. 207.)

BOOK II.

JURISDICTION.

PART I.

JURISDICTION OF THE HIGH COURT.

CHAPTER IV.

GENERAL RULES AS TO JURISDICTION.

(A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In Respect of Persons.*

RULE 52.—The Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain an action or other proceeding against—

- (1) any foreign sovereign;

- (2) any ambassador or other diplomatic agent representing a foreign sovereign and accredited to the Crown;
- (3) any person belonging to the suite of such ambassador or diplomatic agent.

An action or proceeding against the property of any of the persons enumerated in this Rule is, for the purpose of this Rule, an action or proceeding against such person. (p. 215.)

Exception 1.—The Court has jurisdiction to entertain an action against a foreign sovereign, or (*semble*) an ambassador, diplomatic agent, or other person coming within the terms of Rule 52 (2) and (3), if such foreign sovereign, ambassador, or other person, having appeared before the Court voluntarily, waives his privilege and submits to the jurisdiction of the Court. (p. 220.)

Exception 2.—The Court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade. (p. 222.)

(ii) In Respect of Subject-Matter.

RULE 53.—Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land), or
- (2) the recovery of damages for trespass to such immovable. (p. 223.)

Exception.—Where the Court has jurisdiction to entertain an action against a person under either Rule 59, or under any of the Exceptions to Rule 60, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either—

- (a) a contract between the parties to the action, or
 - (b) an equity between such parties,
- with reference to such immovable. (p. 225.)

RULE 54.—The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal or revenue law of a foreign country. (p. 230.)

(B) WHERE JURISDICTION EXISTS.

(i) *In Respect of Persons.*

RULE 55.—Subject to Rule 52, and to the exception hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the Court, *i.e.*, any person may be a party to an action or other legal proceeding in the Court. (p. 233.)

Exception.—The Court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the license or protection of the Crown.

The term “alien enemy” includes any British subject or citizen of an allied or neutral State voluntarily residing during a war with Great Britain in a hostile country. (p. 234.)

RULE 56.—The Court has jurisdiction in an action over any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court. (p. 235.)

(ii) *In Respect of Subject-Matter.*

RULE 57.—The Court has jurisdiction to entertain proceedings for the determination of any right over, or in respect of,

(1) any immovable,

(2) any movable,

situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the Court in particular kinds of action or proceedings. (p. 238.)

RULE 58.—Subject to Rules 52 to 54, the Court exercises—

(1) Jurisdiction in actions *in personam*;

(2) Admiralty jurisdiction *in rem*;

(3) Divorce jurisdiction, and jurisdiction in relation to validity of marriage and to legitimacy;

(4) Jurisdiction in bankruptcy;

(5) Jurisdiction in matters of administration and succession; to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction. (p. 240.)

CHAPTER V.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 59.—When the defendant in an action *in personam* is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises. (p. 241.)

RULE 60.—When the defendant in an action *in personam* is, at the time for the service of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action. (p. 250.)

Exception 1.—The Court has jurisdiction to entertain an action against a defendant who is not in England, whenever the whole subject-matter of the action is land situate in England (with or without rents or profits), or the perpetuation of testimony relating to such land. (p. 254.)

Exception 2.—The Court has jurisdiction whenever any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate in England, is sought to be construed, rectified, set aside, or enforced in the action. (p. 255.)

Exception 3.—The Court has jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England. (p. 258.)

Exception 4.—The Court has jurisdiction when the action is [for the administration of the personal estate of any deceased person who at the time of his death was domiciled in England], or for the execution (as to property situate in England) of the trusts of any written instrument, of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England. (p. 261.)

Exception 5.—The Court has jurisdiction whenever the action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract [which either is]

(1) made in England, or

(2) made by or through an agent trading or residing in

England on behalf of a principal trading or residing out of England, or

(3) by its terms or by implication is to be governed by English law,

or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland in respect of a breach committed in England of a contract wherever made, even though such breach was preceded or accompanied by a breach out of England which rendered impossible the performance of the part of the contract which ought to have been performed in England. (p. 262.)

Exception 6.—The Court has jurisdiction whenever the action is founded on a tort committed in England. (p. 265.)

Exception 7.—The Court has jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed, whether damages are or are not also sought in respect thereof. (p. 265.)

Exception 8.—Whenever any person out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the Court has jurisdiction to entertain an action against such first-mentioned person as a co-defendant in the action. (p. 267.)

Exception 9.—The Court has jurisdiction when the action is brought by a mortgagee or mortgagor in relation to the mortgage of personal property situate in England, and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee, but does not seek (unless and except so far as permissible under Exception 5) any personal judgment or order for payment of any monies due under the mortgage. (p. 271.)

Exception 10.—Notwithstanding anything contained in any of the Exceptions to Rule 60, the parties to any contract may agree (a) that the Court shall have jurisdiction to entertain any action in respect of such contract, and, moreover, or in the alternative, (b) that service of any writ of summons in any such action may be effected in any place within or out of England on any party, or on any person on behalf of any party, or in any manner specified or indicated in such contract. Service of any such writ of summons at the place (if any), or on the party, or on the person (if any), or in the

manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident, and if no place, or mode, or person be so specified or indicated, service out of England of such writ may be ordered. (p. 272.)

Exception 11.—The Court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action. (p. 275.)

CHAPTER VI.

ADMIRALTY JURISDICTION *IN REM*.

RULE 61.—The Court has jurisdiction to entertain an action *in rem* against any ship, or *res* (such as cargo) connected with a ship, if

- (1) the action is an Admiralty action; and
 - (2) the ship or *res* is in England, or within three miles of the coast of England,
- and not otherwise. (p. 280.)

CHAPTER VII.

JURISDICTION IN RESPECT OF DIVORCE—DECLARATION OF NULLITY OF MARRIAGE—AND DECLARATION OF LEGITIMACY.

I. DIVORCE.

(A) WHERE COURT HAS JURISDICTION.

RULE 62.—The Court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings.

This jurisdiction is not affected by—

- (1) the residence of the parties, or
- (2) the allegiance of the parties, or
- (3) the domicile of the parties at the time of the marriage, or

- (4) the place of the marriage, or
- (5) the place where the offence, in respect of which divorce is sought, is committed.

In this Digest the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others. (p. 285.)

SUB-RULE.—On a petition for divorce presented by a husband domiciled in England, the Court has jurisdiction to award costs, and (if claimed by the husband) damages, against a co-respondent named in the petition, whatever his place of residence or nationality. (p. 290.)

(B) WHERE COURT HAS NO JURISDICTION.

RULE 63.—Subject to the possible exception hereinafter mentioned, the Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings. (p. 291.)

Exception.—Where—

- (1) a foreigner marries in England a woman then domiciled in England, and such marriage is legally valid according to the law of England, and such foreigner is either at the time of the marriage domiciled in a foreign country, or after the time of the marriage acquires a domicile in a foreign country, and
 - (2) such English marriage is, in such foreign country, declared to be invalid by the Courts thereof,
- the High Court probably has jurisdiction to entertain a petition for divorce on the part of the wife. (p. 294.)

II. JUDICIAL SEPARATION AND RESTITUTION OF CONJUGAL RIGHTS.

RULE 64.—The Court has jurisdiction to entertain a suit for the restitution of conjugal rights or (*semble*) for judicial separation when both the parties thereto

- (1) were domiciled in England at the time of the institution of the suit; or
- (2) had a matrimonial home in England when their cohabitation ceased, or the events occurred on which a claim for separation is based; or
- (3) were both resident in England at the time of the institution of the suit. (p. 296.)

III. DECLARATION OF NULLITY OF MARRIAGE.

RULE 65.—The Court has jurisdiction to entertain a suit for the declaration of the nullity of any existing marriage—

- (1) where the marriage was celebrated in England; or
- (2) where the respondent is resident in England, not on a visit as a traveller and not having taken up that residence for the purpose of the suit; or
- (3) where the parties to the marriage are domiciled in England (?). (p. 300.)

IV. DECLARATION OF LEGITIMACY.

RULE 66.

- (1) Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court, praying the Court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to the Court for a decree declaring that his marriage was, or is, a valid marriage; and the Court has jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, is binding to all intents and purposes on the Crown, and on all persons whomsoever.
- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the Court for a decree declaratory of his right to be deemed a natural-born British subject, and the Court has jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just; and

where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the Court, except as hereinafter mentioned, is valid and binding to all intents and purposes upon the Crown and all persons whomsoever.

- (3) The decree of the Court does not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person, if subsequently proved to have been obtained by fraud or collusion. (p. 305.)

CHAPTER VIII.

JURISDICTION IN BANKRUPTCY AND IN REGARD TO WINDING-UP OF COMPANIES.

I. BANKRUPTCY.

Interpretation of Terms.

RULE 67.—In this Rule, and in all the Rules of this Digest which refer to an English bankruptcy, the following terms have, unless the contrary appear from the context, the following meanings:—

- (1) "The Court" means the Court having jurisdiction in bankruptcy under the Bankruptcy Act, 1914, and includes
 - (i) the High Court, and
 - (ii) the County Courts.
- (2) The expression "debtor," unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him,
 - (a) was personally present in England; or
 - (b) ordinarily resided or had a place of residence in England; or

(c) was carrying on business in England personally, or by means of an agent or manager; or

(d) was a member of a firm or partnership which carried on business in England.

(3) "An act of bankruptcy" means any one or more of the following acts when committed by a debtor:

(a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;

(b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof;

(c) If in England or elsewhere he makes any conveyance or transfer of his property, or any part thereof, or creates any charge thereon, which would, under the Bankruptcy Act, 1914, or any other Act, be void as a fraudulent preference if he were adjudged bankrupt;

(d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house;

(e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days;

(f) If he files in the Court a declaration of his inability to pay his debts, or presents a bankruptcy petition against himself;

(g) If a creditor has obtained a final judgment or final order against him for any amount, and execution thereon not having been stayed, has served on him in England or, by leave of the Court, elsewhere, a bankruptcy notice under the Bankruptcy Act, 1914, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals

or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained;

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend; payment of his debts.

- (4) "A petition" means a petition presented to the Court either by a creditor (called a petitioning creditor), or by a debtor (called a petitioning debtor), that the Court shall make a receiving order, which is the first step towards a debtor being adjudicated a bankrupt. (p. 312.)

(A) WHERE COURT HAS NO JURISDICTION.

RULE 68.—The Court has no jurisdiction on a bankruptcy petition being presented by a creditor or a debtor to adjudicate bankrupt any person who

- (1) is not a debtor as defined in Rule 67 (2), *ante*, or
- (2) has not committed or suffered any act of bankruptcy as defined in Rule 67 (3), *ante*. (p. 317.)

RULE 69.—As a creditor is not entitled to present a bankruptcy petition against a debtor, so the Court has no jurisdiction to adjudicate a debtor a bankrupt unless

- (a) the debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to fifty pounds, and
- (b) the debt is a liquidated sum payable either immediately or at some future time, and
- (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and
- (d) the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business in England, or (except in the case of a person domiciled in Scotland or Ireland, or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business in England personally, or by means of an agent or manager,

or (except as aforesaid) is, or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners, or an agent or manager.

Provided that in any case where, under the Debtors Act, 1869, s. 5, application is made by a judgment creditor to a Court having bankruptcy jurisdiction for the committal of a judgment debtor, the Court may, if it sees fit, decline to commit, and in lieu, with the consent of the judgment creditor, make a receiving order as against the debtor. (p. 320.)

(B) WHERE COURT HAS JURISDICTION.

(a) *On Creditor's Petition.*

RULE 70.—Subject to the effect of Rules 68 and 69, the Court, on a bankruptcy petition being presented by a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt) who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the Court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England, or
- (2) by the absence of the debtor from England at the time of the presentation of the petition, or
- (3) by the fact that either the creditor or the debtor is an alien. (p. 323.)

(b) *On Debtor's Petition.*

RULE 71.—The Court has, on a bankruptcy petition being presented by a debtor alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt. (p. 326.)

RULE 72.—The jurisdiction of the Court to adjudge bankrupt a debtor on the petition of a creditor, or on the petition of the debtor, is not taken away by the fact of the debtor being already adjudged bankrupt by the Court of a foreign country, whether such country do or do not form part of the British dominions. (p. 327.)

II. WINDING-UP OF COMPANIES.

(A) WHERE COURT HAS NO JURISDICTION.

RULE 73.—The Court has no jurisdiction to wind up

- (1) any company registered in Scotland or in Ireland;
- (2) any unregistered company having a principal place of business situate in Scotland or in Ireland, but not having a principal place of business situate in England;
- (3) any unregistered foreign company which, though carrying on business in England, has no office in England;
- (4) any unregistered company which does not fall within the Companies (Consolidation) Act, 1908.

The term “the Court,” in this Rule and in Rule 74, means any Court in England having jurisdiction to wind up a company under the Companies (Consolidation) Act, 1908, and the Acts amending the same, and includes the High Court and any other Court in England having such jurisdiction. (p. 329.)

(B) WHERE COURT HAS JURISDICTION.

RULE 74.—Subject to the effect of Rule 73, the Court has jurisdiction to wind up—

- (1) any company registered in England;
- (2) any unregistered company having a principal place of business in England;
- (3) any unregistered foreign company having a branch office in England. (p. 331.)

CHAPTER IX.

JURISDICTION IN MATTERS OF ADMINISTRATION
AND SUCCESSION.

RULE 75.—In this Digest, unless the context or subject-matter otherwise requires,

- (1) “Property” means and includes:—
 - (i) any immovable;
 - (ii) any movable.
- (2) “Administrator” includes an executor.
- (3) “Personal representative” includes an administrator, and

also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the property of the deceased by way of administration.

- (4) "Foreign personal representative" means the personal representative of the deceased under the law of a foreign country.
- (5) "Administration" means the dealing according to law with the property of a deceased person by a personal representative.
- (6) "Succession" means beneficial succession to the property of a deceased person.
- (7) "Grant" means a grant of letters of administration, or of probate of a will.
- (8) "English grant" means a grant made by the Court.
- (9) "Assets" means such property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with. (p. 335.)

(A) ADMINISTRATION.

RULE 76.—The Court has jurisdiction to make a grant in respect of the property of a deceased person, either

- (1) where such property is locally situate in England at the time of his death, or
- (2) where such property has, or the proceeds thereof have, become locally situate in England at any time since his death,

and not otherwise.

The locality of the deceased's property under this Rule is not affected by his domicile at the time of his death. (p. 339.)

(B) SUCCESSION.

RULE 77.—Where the Court has no jurisdiction to make a grant, the Court has no jurisdiction with regard to the succession to the property of a deceased person. (p. 350.)

RULE 78.—Where the Court has jurisdiction to make a grant, the Court has, in general, jurisdiction to determine any question with regard to the succession to the assets of a deceased person. (p. 351.) •

CHAPTER X.

STAYING ACTION—*LIS ALIBI PENDENS*.

RULE 79.—The Court has jurisdiction to interfere, when there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose stay or dismiss an action or other proceeding.

But this jurisdiction will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious or oppressive. (p. 355.)

SUB-RULE.—The Court has jurisdiction to stay an action vexatious or oppressive if proceedings are taken in respect of the same subject and against the same defendant both in the Court and in a Court of a foreign country.

(1) If such foreign Court is a Court of the United Kingdom or (*semble*) of any country forming part of the British dominions, the plaintiff's proceedings are *prima facie* vexatious.

(2) If such foreign Court is a Court of any country forming part of the British dominions, the plaintiff's proceedings are *prima facie* not vexatious. (p. 355.)

CHAPTER XI.

EXTRA-TERRITORIAL EFFECT OF ENGLISH JUDGMENT — ENGLISH BANKRUPTCY — ENGLISH GRANT OF ADMINISTRATION.

(A) ENGLISH JUDGMENT.

RULE 80.—A judgment of the Court (called in this Digest English judgment) has, subject to the exceptions hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law. (p. 362.)

Exception 1.—An English judgment for any debt, damages, or costs may be rendered operative in Ireland or Scotland by the registration of a certificate thereof in accordance with the provisions of Rule 116. (p. 362.)

Exception 2.—Any order of an English Bankruptcy Court shall be enforced in Scotland and Ireland in the Courts having jurisdiction in bankruptcy there in the same manner as if the order had been made by the Court which is required to enforce it. (p. 363.)

Exception 3.—Any order made by the Court in England having jurisdiction to wind up a company in the course of such winding-up, shall be enforced in Scotland and Ireland in the Courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland, and in the same manner in all respects as if the order had been made by these Courts. (p. 363.)

Exception 4.—The powers and authority with regard to the administration and management of the estates of lunatics conferred by the Lunacy Act, 1890, and amending Acts on the Judge in Lunacy, apply to the property of a lunatic, whether immovable or movable, situate in any British possession. (p. 363.)

Exception 5.—The powers of the Court in England to make vesting orders under the Trustee Act, 1893, shall extend to all land and personal estate in the British dominions, except Scotland. (p. 363.)

(B) ENGLISH BANKRUPTCY AND WINDING-UP OF COMPANIES.

I. BANKRUPTCY.

(i) *As an Assignment.*

RULE 81.—An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1914 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables (land),

(2) movables,

whether situate in England or elsewhere. (p. 364.)

(ii) *As a Discharge.*

RULE 82.—A discharge under an English bankruptcy from any debt or liability is, in any country forming part of the British dominions, a discharge from such debt or liability, wherever or under whatever law the same has been contracted or has arisen. (p. 371.)

II. WINDING-UP.

RULE 83.—The winding-up of a company under the Companies (Consolidation) Act, 1908, impresses the whole of the property of the company in the United Kingdom with a trust for application in the course of the winding-up, for the benefit of the persons interested in the winding-up. (p. 371.)

(C) ENGLISH GRANT OF ADMINISTRATION.

RULE 84.—An English grant has no direct operation outside England.

This Rule must be read subject to Rules 88 to 90. (p. 374.)

RULE 85.—An English grant extends to all the movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who has obtained an English grant (who is hereinafter called an English administrator) may—

- (1) sue in an English Court in relation to movables of the deceased situate in any foreign country;
- (2) receive or recover in a foreign country movables of the deceased situate in such country (?). (p. 374.)

RULE 86.—When a person dies domiciled in England, the Courts of any foreign country ought, by means of a grant, otherwise, to enable the English administrator to act as personal representative of the deceased in such foreign country, in regard to any movable there situate. (p. 376.)

RULE 87.—The following property of a deceased person passes to the administrator under an English grant:—

- (1) Any property of the deceased which at the time of his death is locally situate in England.
- (2) Any movables of the deceased, or the proceeds of any property of the deceased, which, though not situate in England at the time of the death of the deceased, are received, recovered, or otherwise reduced into possession by the English administrator as such administrator.
- (3) Any movables of the deceased which after his death are brought into England before any person has, in any foreign country where they are situate, obtained good title thereto under the law of such foreign country (*lex situs*), and reduced them into possession (p. 377.)

Extension of English Grant to Ireland and Scotland.

RULE 88.—An English grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in Northern or Southern Ireland, be sealed with the seal of the said Court, and be of the like force and effect, and have the same operation in Northern or Southern Ireland, as a grant of probate or letters of administration made by the said Court.

The latter grant is hereinafter referred to as an Irish grant. (p. 381.)

RULE 89.—An English grant made to the administrator of any person duly stated to have died domiciled in England will, on production of the said grant to, and deposition of a copy thereof with, the clerk of the Sheriff Court of the County of Edinburgh, be duly indorsed with the proper certificate by the said clerk, and thereupon have the same operation in Scotland as if a confirmation had been granted by the said Court. (p. 382.)

RULE 90.—Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession, *i.e.*, to any part of the British dominions not forming part of the United Kingdom, adequate provision is made for the recognition in that possession of an English grant. (p. 384.)

PART II.

JURISDICTION OF FOREIGN COURTS.

CHAPTER XII.

GENERAL RULES AS TO JURISDICTION.

RULE 91.—In this Digest

- (1) "Proper Court" means a Court which is authorised by the sovereign, under whose authority such Court acts, to adjudicate upon a given matter.
- (2) "Court of competent jurisdiction" means a Court acting under the authority of a sovereign of a country who,

as the sovereign of such country, has, according to the principles maintained by English Courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the Courts of a foreign country "have jurisdiction," it is meant that they are Courts of competent jurisdiction;
- (ii) it is stated that the Courts of a foreign country "have no jurisdiction," it is meant that they are not Courts of competent jurisdiction.
- (3) "Foreign judgment" means a judgment, decree, or order of the nature of a judgment (by whatever name it be called), which is pronounced or given by a foreign Court. (p. 386.)

(A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In Respect of Persons.*

RULE 92.—The Courts of a foreign country have no jurisdiction over, *i.e.*, are not Courts of competent jurisdiction as against—

- (1) any sovereign,
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country. (p. 388.)

(ii) *In Respect of Subject-Matter.*

RULE 93.—The Courts of a foreign country have no jurisdiction—

- (1) to adjudicate upon the title, or the right to the possession, of any immovable not situate in such country, or
- [(2) (*semble*) to give redress for any injury in respect of any immovable not situate in such country (?)]. (p. 389.)

(B) WHERE JURISDICTION DOES EXIST.

RULE 94.—Subject to Rules 92 and 93, the Courts of a foreign country have jurisdiction (*i.e.*, are Courts of competent jurisdiction)—

- (1) in an action or proceeding *in personam*;
- (2) in an action or proceeding *in rem*;

- (3) in matters of divorce, or having reference to the validity of a marriage;
- (4) in matters of administration and succession, to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction. (p. 392.)

CHAPTER XIII.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 95.—In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases:—

First Case.—Where at the time of the commencement of the action the defendant was resident [or present?] in such country, so as to have the benefit, and be under the protection, of the laws thereof.

Second Case.—Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country (?).

Third Case.—Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, *i.e.*, has precluded himself from objecting thereto—

- (a) by appearing as plaintiff in the action, or
 - (b) by voluntarily appearing as defendant in such action, or
 - (c) by having expressly or impliedly contracted to submit to the jurisdiction of such Courts.
- (p. 393.)

RULE 96.—In an action *in personam* the Courts of a foreign country do not acquire jurisdiction either—

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country, or
- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country. (p. 408.)

CHAPTER XIV.

JURISDICTION IN ACTIONS *IN REM*.

RULE 97.—In an action or proceeding *in rem* the Courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country. (p. 413.)

CHAPTER XV.

JURISDICTION IN MATTERS OF DIVORCE AND AS
REGARDS VALIDITY OF MARRIAGE.

I. DIVORCE.

(A) WHERE COURTS HAVE JURISDICTION.

RULE 98.—The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce.

This Rule applies to

- (1) an English marriage,
- (2) a foreign marriage. (p. 416.)

SUB-RULE.—The Courts of a foreign country which have jurisdiction to dissolve the marriage of the parties thereto have jurisdiction to entertain an action against a co-respondent in a divorce suit for damages due from such co-respondent to the husband in favour of whom such divorce is granted, and this without reference to the residence or the domicile of such co-respondent at the commencement of the suit. (p. 419.)

(B) WHERE COURTS HAVE NO JURISDICTION.

RULE 99.—Subject to the possible exception hereinafter mentioned, the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce. (p. 420.)

Exception.—The Courts of a foreign country, where the parties to a marriage are not domiciled, have jurisdiction to dissolve their marriage, if the divorce granted by such Courts would

be held valid by the Courts of the country where at the time of the proceedings for divorce the parties are domiciled. (p. 422.)

II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 100.—The Courts of a foreign country have (*semble*) jurisdiction to declare the nullity of any marriage celebrated in such country. (p. 424.)

CHAPTER XVI.

JURISDICTION IN MATTERS OF ADMINISTRATION AND SUCCESSION.

RULE 101.—The Courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicile of the deceased. (p. 427.)

RULE 102.—The Courts of a foreign country have jurisdiction to determine the succession to all movables wherever locally situate of a testator or intestate dying domiciled in such country. (p. 427.)

CHAPTER XVII.

EFFECT OF FOREIGN JUDGMENTS IN ENGLAND.

I. GENERAL.

(i) *No Direct Operation.*

RULE 103.—A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rules 116 and 117. (p. 429.)

(ii) *Invalid Foreign Judgments.*

RULE 104.—Any foreign judgment which is not pronounced by a Court of competent jurisdiction is invalid.

Whether a Court which has pronounced a foreign judgment is, or is not, a Court of competent jurisdiction in respect of the matter adjudicated upon by the Court is to be determined in accordance with Rules 91 to 102.

The validity of a foreign judgment is not, in general, affected by the fact that the Court which pronounces the judgment is not a proper Court. (p. 429.)

RULE 105.—A foreign judgment is invalid which is obtained by fraud.

Such fraud may be either

- (1) fraud on the part of the party in whose favour the judgment is given; or
- (2) fraud on the part of the Court pronouncing the judgment. (p. 433.)

RULE 106.—A foreign judgment is, possibly, invalid when the Court pronouncing the judgment refuses to give such recognition to the law of other nations as is required by the principles of private international law (?). (p. 439.)

RULE 107.—A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice (*e.g.*, owing to want of due notice to the party affected thereby). But in such a case the Court is (generally) not a Court of competent jurisdiction. (p. 440.)

RULE 108.—A foreign judgment shown to be invalid under any of the foregoing Rules 104 to 107, is hereinafter termed an invalid foreign judgment. (p. 441.)

RULE 109.—An invalid foreign judgment has (subject to the possible exception hereinafter mentioned) no effect. (p. 441.)

Exception.—An invalid foreign judgment *in rem* may possibly have an effect in England as an assignment, though not as a judgment. (p. 442.)

(iii) *Valid Foreign Judgments.*

RULE 110.—A foreign judgment, which is not an invalid foreign judgment under Rules 104 to 107, is valid, and is hereinafter termed a valid foreign judgment. (p. 444.)

RULE 111.—Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid. (p. 444.)

RULE 112.—A valid foreign judgment is conclusive as to any

matter thereby adjudicated upon, and cannot be impeached for any error either

- (1) of fact, or
- (2) of law. (p. 444.)

RULE 113.—A valid foreign judgment has the effects stated in Rules 114 to 121; and these effects depend upon the nature of the judgment. (p. 447.)

II. PARTICULAR KINDS OF JUDGMENTS.

(A) JUDGMENT *in Personam*.

(a) *As Cause of Action*.

RULE 114.—Subject to the possible exception hereinafter mentioned, a valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is

- (1) for a debt, or definite sum of money, and
- (2) final and conclusive,

but not otherwise.

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given. (p. 448.)

Exception.—An action (*semble*) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England. (p. 452.)

SUB-RULE.—A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given. (p. 454.)

(b) *As Defence*.

RULE 115.—A valid foreign judgment *in personam*, if it is final and conclusive on the merits (but not otherwise), is a good defence to an action for the same matter when either

- (1) the judgment was in favour of the defendant, or
- (2) the judgment, being in favour of the plaintiff, has been satisfied. (p. 455.)

D.

f

(c) *Extension of Certain Judgments in Personam of Superior Courts in one Part of the British Dominions to any other Part.*

RULE 116.—A judgment of a Superior Court in any part of the United Kingdom for any debt, damages, or costs, has, on a certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the Court in which the certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration as aforesaid in the Court in which the certificate is registered.

The term "Superior Court" means in this Rule

- (1) as applied to England, the High Court of Justice in England;
- (2) as applied to Ireland, the High Court of Justice in Northern or Southern Ireland;
- (3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decreet) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland. (p. 458.)

RULE 117.—When Part II. of the Administration of Justice Act, 1920, is applied by Order in Council to any part of the British dominions outside the United Kingdom, a judgment creditor who has obtained a judgment in a Superior Court in such part of the British dominions, under which a sum of money is made payable, may apply to a Superior Court in the United Kingdom, at any time within twelve months (or such longer period as may be allowed by the Court) after the date of the judgment, to have the judgment registered in the Court, and, if they think it is just and convenient that the judgment should be enforced in the United Kingdom, the Court may order the judgment to be registered accordingly, and from the date of registration the judgment shall be of the same force and effect, and proceedings may be taken upon it, as if it were a judgment of the Court in which it is registered.

Provided that no judgment shall be ordered to be registered if

- (a) the original Court acted without jurisdiction; or
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did not volun-

tarily appear or otherwise submit or agree to submit to the jurisdiction of that Court; or

- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original Court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that Court or agreed to submit to the jurisdiction of that Court; or
- (d) the judgment was obtained by fraud; or
- (e) the judgment debtor satisfies the registering Court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or
- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering Court. (p. 462.)

(B) JUDGMENT *in Rem*.

RULE 118.—A valid foreign judgment *in rem* in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced. (p. 465.)

RULE 119.—A valid foreign judgment *in rem* given by a Court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment. (p. 467.)

(C) JUDGMENT, OR SENTENCE, OF DIVORCE.

RULE 120.—A valid foreign judgment, or sentence, of divorce has in England the same effect as a divorce granted by the Court. (p. 468.)

(D) JUDGMENT IN MATTERS OF SUCCESSION.

RULE 121.—A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the Court. (p. 469.)

CHAPTER XVIII.

EFFECT IN ENGLAND OF FOREIGN BANKRUPTCY;
FOREIGN GRANT OF ADMINISTRATION.

(A) FOREIGN BANKRUPTCY.

I. AS AN ASSIGNMENT.

Bankruptcy in Ireland, Scotland, or British India.

RULE 122.—An assignment of a bankrupt's property to the representative of his creditors—

- (1) under the Irish Bankrupt and Insolvent Act, 1857 (Irish Bankruptcy), or
- (2) under the Bankruptcy (Scotland) Act, 1913 (Scottish Bankruptcy), or
- (3) under the Indian Insolvency Act, 1848,

is, or operates as, an assignment to such representative of the bankrupt's

(i) immovables (land),

(ii) movables,

wherever situate. (p. 471.)

Bankruptcy in any Foreign Country, except Ireland, Scotland, or British India.

RULE 123.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country not forming part of the United Kingdom or British India, is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England. (p. 472.)

RULE 124.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country, whether the bankrupt is domiciled there or not, is or operates as an assignment of the movables of the bankrupt situate in England. (p. 473.)

English and Foreign Bankruptcy.

RULE 125.—Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property,

which might, under any of the foregoing Rules, operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date. (p. 476.)

II. AS A DISCHARGE.

RULE 126.—A discharge from any debt or liability under the bankruptcy law of the country where the debt or liability has been contracted or has arisen [or perhaps where it is to be paid or satisfied (?)] is a discharge therefrom in England. (p. 477.)

RULE 127.—Subject to Rule 128, the discharge from any debt or liability under the bankruptcy law of a foreign country where such debt or liability has neither—

(1) been contracted or has arisen, nor

(2) is to be paid or satisfied,

is not a discharge therefrom in England. (p. 480.)

RULE 128.—A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under—

(1) an English bankruptcy,

(2) an Irish bankruptcy,

(3) a Scottish bankruptcy,

(4) in certain circumstances under an Indian bankruptcy, is, in any country forming part of the British dominions, a discharge from such debt or liability wherever, or under whatever law, the same has been contracted or has arisen. (p. 483.)

(B) FOREIGN GRANT OF ADMINISTRATION.

RULE 129.—A grant of administration or other authority to represent a deceased person under the law of a foreign country has no operation in England.

This Rule must be read subject to the effect of Rules 133 to 135. (p. 485.)

RULE 130.—Where a person dies domiciled in a foreign country, leaving movables in England, the Court will (in general) make a grant to his personal representative under the law of such foreign country. (p. 486.)

RULE 131.—A foreign personal representative has (*semble*) a good title in England to any movables of the deceased which—

(1) if they are movables which can be touched, *i.e.*, goods, he has in any foreign country acquired a good title to

under the *lex situs* [and has reduced into possession (?)];

- (2) if they are movables which cannot be touched, *i.e.*, debts or other choses in action, he has in a foreign country acquired a good title to under the *lex situs*, and has reduced into possession. (p. 489.)

RULE 132.—A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

- (1) if the foreign personal representative sends or brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England;
- (2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England. (p. 493.)

Extension of Irish Grant and Scottish Confirmation to England.

RULE 133.—An Irish grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said Court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant. (p. 495.)

RULE 134.—A Scottish confirmation of the executor of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposition of a copy thereof with the proper officer of the said Court, be sealed with the seal of the said Court, and have thereupon in England the like force and effect as an English grant. (p. 495.)

Extension of Colonial or Indian Grant to England.

RULE 135.—Whenever the Colonial Probates Act, 1892, is by Order in Council made applicable to any British possession, *i.e.*, to any part of the British dominions not forming part of the

United Kingdom, the grant of probate or letters of administration may, on

(1) payment of the proper duty, and

(2) production of the said grant to, and deposition of a copy thereof with, the High Court in England,

be sealed with the seal of the said Court, and thereupon shall be of the like force and effect, and have the same operation in England, as an English grant. (p. 497.)

BOOK III.

CHOICE OF LAW.

CHAPTER XIX.

STATUS.

RULE 136.—Transactions taking place in England are not affected by any status existing under foreign law which either

(1) is of a kind unknown to English law, or

(2) is penal. (p. 500.)

RULE 137.—Any status existing under the law of a person's domicile is recognized by the Court as regards all transactions taking place wholly within the country where he is domiciled. (p. 504.)

RULE 138.—In cases which do not fall within Rule 136, the existence of a status existing under the law of a person's domicile is recognized by the Court, but such recognition does not necessarily involve the giving effect to the results of such status. (p. 505.)

CHAPTER XX.

STATUS OF CORPORATIONS.

RULE 139.—The existence of a foreign corporation duly created under the law of a foreign country is recognized by the Court. (p. 511.)

RULE 140.—The capacity of a corporation to enter into any

legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs. (p. 511.)

CHAPTER XXI.

FAMILY RELATIONS.

(A) HUSBAND AND WIFE.

RULE 141.—The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England. (p. 514.)

(B) PARENT AND CHILD.

RULE 142.—The authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England. (p. 514.)

RULE 143.—The rights of a parent domiciled in a foreign country over the movables in England belonging to a minor are, possibly, governed by the law of the parent's domicile, but are more probably governed, while the minor is in England, by the law of England (?). (p. 515.)

(C) GUARDIAN AND WARD.

RULE 144.—A guardian appointed under the law of a foreign country can exercise at the discretion of the Court control over the person of his ward in England, and over movables belonging to his ward situate in England. (p. 517.)

(D) LEGITIMACY.

RULE 145.—A child born anywhere in lawful wedlock is legitimate. (p. 520.)

RULE 146.—The law of the father's domicile at the time of the birth of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage of the child's parents, determine whether the child becomes, or may

become, legitimate in consequence of the subsequent marriage of the parents (*legitimitio per subsequens matrimonium*).

Case 1.—If *both* the law of the father's domicile at the time of the birth of the child *and* the law of the father's domicile at the time of the subsequent marriage allow of *legitimitio per subsequens matrimonium*, the child becomes, or may become, legitimate on the marriage of the parents.

Case 2.—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimitio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

Case 3.—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimitio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents.

Provided that a person born out of lawful wedlock cannot be heir to English real estate, nor can anyone, except his issue, inherit English real estate from him. (p. 521.)

(E) LUNATIC AND CURATOR, OR COMMITTEE.

RULE 147.—(1) The powers and authorities conferred by the Lunacy Act, 1890, upon the Judge in Lunacy in respect of the management and administration of the property of a lunatic extend to the lunatic's property of whatever kind situate in any British possession.

(2) The powers of management and administration of the estate of a lunatic so found by inquisition in England, vested in the Judge in Lunacy, and the Committee of the lunatic's estate, extend to the personal property in Ireland of the lunatic, provided it does not exceed 2,000*l.* in value or the income thereof does not exceed 100*l.* a year, and similar provisions apply to the personal property in England of lunatics so found on inquisition in Ireland.

(3) The powers of management and administration conferred in England with regard to cases in which the property of a person of unsound mind does not exceed 2,000*l.* in value or the income 100*l.* a year, and the like powers conferred in Ireland, extend to the property in Ireland or England, as the case may be, of the

person of unsound mind, if the total of his property in both countries does not exceed 2,000*l.* or the income does not exceed 100*l.*

(4) The Committee of the estate of a person found lunatic by inquisition in England has the same powers with regard to the lunatic's personal property in Scotland as a tutor at law after cognition or a *curator bonis* to a person of unsound mind in Scotland, and a tutor at law or *curator bonis* duly appointed in Scotland has the same powers with respect to the lunatic's personal property in England as a Committee of the estate of a lunatic so found by inquisition. (p. 533.)

RULE 148.—A person appointed by a foreign decree or commission the curator or Committee of a lunatic resident in a foreign country (hereinafter called a foreign curator) does not acquire the right as such curator to control the person of the lunatic in England, though, in a proper case, on application to the Judge in Lunacy, arrangements may be made for the handing over of the lunatic to the foreign curator. (p. 534.)

RULE 148A.—(1) The foreign curator of a lunatic may, at the discretion of the Court, enforce by action claims in respect of movable property of the lunatic in England.

(2) The foreign curator of a lunatic resident out of England may, at the discretion of the Judge in Lunacy, secure the transfer to himself of stock standing in the name of or vested in the lunatic. (p. 535.)

CHAPTER XXII.

NATURE OF PROPERTY.

RULE 149.—The law of a country where a thing is situate (*lex situs*) determines whether

(1) the thing itself, or

(2) any right, obligation, or document connected with the thing,

is to be considered an immovable or a movable. (p. 539.)

CHAPTER XXIII.

IMMOVABLES.

RULE 150.—All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*). (p. 542.)

Exception 1.—The effect of a contract with regard to an immovable is governed by the proper law of the contract (?).

The proper law of such contract is, in general, but not necessarily, the law of the country where the immovable is situate (*lex situs*). (p. 553.)

Exception 2.—Where there is a marriage contract, or settlement, the terms of the contract or settlement govern the mutual rights of husband and wife in respect of all English immovables (land) within its terms, which are then possessed or are afterwards acquired.

The marriage contract, or settlement, will be construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the contrary, by the law of the husband's actual [or intended (?)] domicile at the time of the marriage.

The husband's actual [or intended (?)] domicile at the time of the marriage is hereinafter termed the "matrimonial domicile." (p. 553.)

Exception 3.—Under Exceptions 1 and 2 to Rule 195 [*i.e.*, under the Wills Act, 1861, sects. 1 and 2], a will made by a *British subject* may, as regards such immovables in the United Kingdom as form part of his personal estate (chattels real), be valid as to form, though not made in accordance with the formalities required by the *lex situs*. (p. 556.)

Exception 4.—An assignment of a bankrupt's property to the representative of his creditors under the English, or the Irish, or the Scottish Bankruptcy Acts, or the Indian Insolvency Act, is an assignment of the bankrupt's immovables wherever situate. (p. 557.)

Exception 5.—The limitation to an action or other proceeding in England with regard to a foreign immovable is (probably) governed by the *lex fori*. (p. 557.)

CHAPTER XXIV.

MOVABLES.

Capacity.

RULE 151.—A person's capacity to assign a movable, or any interest therein, is governed by the law of his domicile (*lex domicilii*) at the time of the assignment (?).

This Rule must be read subject to the effect of Rules 152 and 153. (p. 560.)

Assignment of Movables in Accordance with Lex Situs.

RULE 152.—An assignment of a movable which can be touched (goods), giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (*lex situs*), is valid. (p. 561.)

RULE 153.—An assignment of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid.

Provided that

- (1) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor;
- (2) the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori*. (p. 565.)

RULE 154.—Subject to the exception hereinafter mentioned, and to Rules 152 and 153, the assignment of a movable, wherever situate, in accordance with the law of the owner's domicile, is valid. (p. 568.)

Exception.—When the law of the country where a movable is situate (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicile (*lex domicilii*) is, if the special form be not followed, invalid. (p. 570.)

CHAPTER XXV.

CONTRACTS—GENERAL RULES.

(A) *PRELIMINARY.*

RULE 155.—In this Digest, the term “proper law of a contract” means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law, or laws, to which the parties intended, or may fairly be presumed to have intended, to submit themselves. (p. 572.)

RULE 156.—Where any Act of Parliament intended to have extra-territorial operation makes any contract—

(1) valid, or

(2) invalid,

the validity or invalidity, as the case may be, of such contract must be determined in accordance with such Act of Parliament, independently of the law of any foreign country whatever. (p. 573.)

RULE 157.—A contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure. (p. 575.)

(B) *VALIDITY OF CONTRACT.*(i) *Capacity.*

RULE 158.—Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

(1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid.

(2) If he has not such capacity by that law, the contract is invalid. (p. 577.)

Exception 1.—A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*). (p. 580.)

Exception 2.—A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*. (p. 583.)

(ii) *Form.*

RULE 159.—Subject to the exceptions hereinafter mentioned, the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*).

- (1) Any contract is formally valid which is made in accordance with any form recognized as valid by the law of the country where the contract is made (which form is, in this Digest, called the local form).
- (2) No contract is valid which is not made in accordance with the local form. (p. 583.)

Exception 1.—The formal validity of a contract with regard to an immovable depends upon the *lex situs* (?). (p. 585.)

Exception 2.—A contract made in one country in accordance with the local form in respect of a movable situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*). (p. 586.)

Exception 3.—Possibly a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the contract is to operate, and subject to the law whereof it is made (?). (p. 586.)

Exception 4.—In certain cases a bill of exchange may be treated as valid, though it does not comply with the requirements, as to form, of the law of the country where the contract is made. (p. 588.)

(iii) *Essential Validity.*

RULE 160.—The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law of the contract. (p. 588.)

Exception 1.—A contract (whether lawful by its proper law or not) is invalid if it, or the enforcement thereof, is opposed to English interests of State, or to the policy of English law, or to the moral rules upheld by English law. (p. 593.)

Exception 2.—A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*) (?). (p. 595.)

Exception 3.—A contract (whether lawful by its proper law or not) is, in general, invalid in so far as

- (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*); or
- (2) the contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place.

This exception (*semble*) does not apply to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign country not forming part of the British dominions. (p. 597.)

(C) THE INTERPRETATION AND OBLIGATION OF CONTRACT.

RULE 161.—The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract. (p. 602.)

Sub-Rules for determining the Proper Law of a Contract in Accordance with the Intention of the Parties.

SUB-RULE 1.—When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption. (p. 606.)

SUB-RULE 2.—When the intention of the parties to a contract, with regard to the law governing the contract, is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract. (p. 607.)

SUB-RULE 3.—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—

First Presumption.—*Primâ facie*, the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract

is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

Second Presumption.—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*). (p. 609.)

(D) DISCHARGE OF A CONTRACT.

RULE 162.—The validity of the discharge of a contract (otherwise than by bankruptcy) depends upon the proper law of the contract (?).

- (1) A discharge in accordance with the proper law of the contract is valid.
- (2) A discharge not in accordance with the proper law of the contract is not valid (?). p. 615.)

CHAPTER XXVI.

PARTICULAR CONTRACTS.

(A) CONTRACTS WITH REGARD TO IMMOVABLES.

RULE 163.—The effect of a contract with regard to an immovable is governed by the proper law of the contract (?).

The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (*lex situs*). (p. 618.)

(B) CONTRACTS WITH REGARD TO MOVABLES.

RULE 164.—The effect of a contract with regard to a movable is governed by the proper law of the contract. (p. 620.)

(C) CONTRACT OF AFFREIGHTMENT.

RULE 165.—The term “law of the flag” means the law of the country whereof a ship carries the flag.

When the flag carried by a ship is that of a State including more than one country, the law of the flag means (*semble*) the law of the country where the ship is registered. (p. 621.)

RULE 166.—Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (*i.e.*, a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag.

Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply. (p. 622.)

Exception.—The mode of performing particular acts under a contract of affreightment (*e.g.*, the loading or unloading or delivery of goods) may be governed by the law of the country where such acts take place. (p. 625.)

SUB-RULE.—The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag. (p. 625.)

(D) CONTRACT FOR THROUGH CARRIAGE OF PERSON
OR GOODS.

RULE 167.—The effect of a contract for the carriage of person or goods from a place in one country to a place in another is, as to its general incidents, presumably governed by the law of the place where it is made; but, as to transactions taking place in a particular country, may in certain cases be governed by the law of such country. (p. 626.)

(E) AVERAGE ADJUSTMENT.

RULE 168.—As amongst the several owners of property saved by a sacrifice, the liability to general average is governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say),—

- (1) when the voyage is completed in due course, by the law of the port of destination; or
- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly broken up and the ship and cargo part company. (p. 629.)

RULE 169.—An underwriter is bound by an average adjustment

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duly taken according to the law of the place of adjustment, in the absence of special agreement to the contrary. (p. 630.)

RULE 170.—An English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag. (p. 631.)

(F) *PROVISIONS OF BILLS OF EXCHANGE ACT, 1882, AS TO CONFLICT OF LAWS.*

*Bill of Exchange.*¹

RULE 171.—[Bills of Exchange Act, 1882, s. 2 (part) and s. 4.]—In this Act, unless the context otherwise requires:—

[1] “Acceptance” means an acceptance completed by delivery or notification.

[2] “Bearer” means the person in possession of a bill or note which is payable to bearer.

[3] “Bill” means bill of exchange, and “note” means promissory note.

[4] “Delivery” means transfer of possession, actual or constructive, from one person to another.

[5] “Holder” means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.

[6] “Indorsement” means an indorsement completed by delivery.

[7] “Issue” means the first delivery of a bill or note, complete in form, to a person who takes it as a holder.

[8] “Person” includes a body of persons, whether incorporated or not.

[9] “Value” means valuable consideration.

[10] “Written” includes printed, and “writing” includes print.

[11] (1) An inland bill is a bill which is or on the face of it purports to be

(a) both drawn and payable within the British Islands, or

(b) drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

For the purposes of this Act, “British Islands” mean any part

¹ Rules 171—175 are taken verbatim, with the exception of words or figures in square brackets, from the Bills of Exchange Act, 1882.

of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

- (2) Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill. (p. 632.)

RULE 172.—[Bills of Exchange Act, 1882, s. 72.]—Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made.

Provided that—

- (a) Where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue;
- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. (p. 635.)
- (2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill is determined by the law of the place where such contract is made.

Provided that where an inland bill is indorsed in a foreign country [*i.e.*, a country not forming part of the British Islands], the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom. (p. 639.)

- (3) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured. (p. 642.)

- (4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. (p. 643.)
- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable. (p. 643.)

RULE 173.—[Bills of Exchange Act, 1882, s. 57.]—Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser,—
- (a) The amount of the bill:
 - (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:
 - (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment.
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper. (p. 644.)

Promissory Note.

RULE 174.—[Bills of Exchange Act, 1882, s. 83 (1).]—A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer. (p. 646.)

RULE 175.—[Bills of Exchange Act, 1882, s. 89.]—

- (1) Subject to the provisions in this part [*i.e.*, Part IV. of the Bills of Exchange Act, 1882], and except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.
- (2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order.
- (3) The following provisions as to bills do not apply to notes; namely, provisions relating to—
 - (a) Presentment for acceptance;
 - (b) Acceptance;
 - (c) Acceptance *suprà* protest;
 - (d) Bills in a set.
- (4) Where a foreign note is dishonoured, protest thereof is unnecessary. (p. 647.)

(G) *NEGOTIABLE INSTRUMENTS GENERALLY.*

RULE 176.—Any instrument for securing the payment of money, *e.g.*, a bill of exchange, or a government bond, whether foreign or English, may be made a negotiable instrument, either—

- (1) by custom of the mercantile world in England, which custom may, if well established, be of recent origin; or
- (2) by Act of Parliament.

A “negotiable instrument” means an instrument for securing the payment of money which has the following characteristics:—

- (a) The property in the instrument, and all the rights under it, pass to a *bonâ fide* holder for value by mere delivery to him.
- (b) In the hands of such holder, the property in and the rights under such instrument are not affected by

defects in the title of or defences available against the claims of any prior transferor or holder. (p. 648.)

RULE 177.—No instrument, whether English or foreign, is a negotiable instrument in England, unless it is made so either by custom of the mercantile world in England, or by Act of Parliament. (p. 649.)

(H) *INTEREST.*

RULE 178.—The liability to pay interest, and the rate of interest payable in respect of a debt or loan, is determined by the proper law of the contract under which the debt is incurred or the loan is made. (p. 654.)

(I) *CONTRACTS THROUGH AGENTS.*

Contract of Agency.

RULE 179.—An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country, where the relation of principal and agent is created. (p. 656.)

Relation of Principal and Third Party.

RULE 180.—When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, *i.e.*, the country where the contract is made (*lex loci contractus*). (p. 656.)

(J) *DAMAGES FOR BREACH OF CONTRACT AS AFFECTED BY RATE OF EXCHANGE.*

RULE 181.—When upon the breach of a contract the person in default becomes liable for the payment of a sum of money in a foreign currency, the damages for the purpose of an English judgment must be assessed at the date of the default, and the sum payable must be converted into English currency at the rate of exchange current at that date. (p. 659.)

CHAPTER XXVII.

MARRIAGE.

(A) *VALIDITY OF MARRIAGE.*

RULE 182.—Subject to the exceptions hereinafter mentioned, a marriage is valid when

- (1) each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other, *and*
- (2) any one of the following conditions as to the form of celebration is complied with (that is to say):
 - (i) if the marriage is celebrated in accordance with the local form; or
 - (ii) if the parties enjoy the privilege of extritoriality, and the marriage is celebrated in accordance with any form recognized as valid by the law of the State to which they belong; or
 - (iii) if the marriage [being between British subjects (?)] is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible; or
 - (iv) if the marriage is celebrated in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, s. 22, within the lines of a British Army serving abroad; or
 - (v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, by or before a marriage officer (such, for example, as a British ambassador or British consul) within the meaning of, and duly authorized to be a marriage officer under, the said Act. (p. 661.)

Exception 1.—A marriage is not valid if either of the parties,

being a descendant of George II., marries in contravention of the Royal Marriage Act (12 Geo. III. c. 11). (p. 675.)

Exception 2.—A marriage is, possibly, not valid if *either* of the parties is, according to the law of the country where the marriage is *celebrated*, under an incapacity to marry the other. (p. 677.)

RULE 183.—Subject to the exceptions hereinafter mentioned, no marriage is valid which does not comply, as to *both* (1) the capacity of the parties, *and* (2) the form of the marriage, with Rule 182. (p. 678.)

Exception 1.—The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England. (p. 683.)

Exception 2.—A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicile of both or of either of the parties, is of a kind to which our Courts refuse recognition. (p. 684.)

Exception 3.—Any marriage is valid which is made valid by Act of Parliament. (p. 685.)

(B) ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE.

RULE 184.—Where there is a marriage contract or settlement, the terms of the contract or settlement govern the rights of husband and wife in respect of all movables within its terms which are then acquired or are afterwards acquired. (p. 685.)

SUB-RULE 1.—The marriage contract or settlement will be construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the contrary, with reference to the law of the matrimonial domicile. (p. 687.)

SUB-RULE 2.—The parties may make it part of the contract or settlement that their rights shall be subject to some other law than the law of the matrimonial domicile, in which case their rights will be determined with reference to such other law. (p. 688.)

SUB-RULE 3.—The law of the matrimonial domicile will, in general, decide whether any particular movable (*e.g.*, any future acquisition) is included within the terms of the marriage contract or settlement. (p. 689.)

SUB-RULE 4.—The effect or construction of the marriage contract or settlement is not varied by a subsequent change of domicil. (p. 689.)

RULE 185.—Where there is no marriage contract or settlement, and where no subsequent change of domicil on the part of the parties to the marriage has taken place, the rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicil, without reference to the law of the country where the marriage is celebrated, or where the wife is domiciled before marriage. (p. 690.)

RULE 186.—Where there is no marriage contract or settlement, and where there is a subsequent change of domicil, the rights of husband and wife to each other's movables, both *inter vivos* and in respect of succession, are governed by the law of the new domicil. (p. 691.)

CHAPTER XXVIII.

TORTS.

RULE 187.—Whether an act done in a foreign country is or is not a tort (*i.e.*, a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*). (p. 694.)

RULE 188.—An act done in a foreign country is a tort, and actionable as such in England, if it is *both*

- (1) wrongful, *i.e.*, not justifiable, according to the law of the foreign country where it was done, *and*
- (2) wrongful, *i.e.*, actionable as a tort, according to English law, or, in other words, is an act which, if done in England, would be a tort. (p. 694.)

RULE 189.—An act done in a foreign country is not a tort, or actionable as such, in England, if it *either*—

- (1) is innocent, *i.e.*, justifiable, according to the law of the country where it was done, *or*
- (2) is an act which, if done in England, would not be actionable as a tort. (p. 696.)

SUB-RULE.—An act done in a foreign country which, though wrongful under the law of that country at the moment when it was done, has since that time been the subject of an Act of Indemnity passed by the legislature of such country, is not a tort. (p. 704.)

CHAPTER XXIX.

ADMINISTRATION IN BANKRUPTCY.

RULE 190.—The administration in bankruptcy of the property of a bankrupt which has passed to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*). (p. 706.)

CHAPTER XXX.

ADMINISTRATION AND DISTRIBUTION OF DECEASED'S MOVABLES.

(A) ADMINISTRATION.

RULE 191.—The administration of a deceased person's movables is governed wholly by the law of the country where the administrator acts, and from which he derives his authority to collect them, *i.e.*, in effect, by the law of the country where the administration takes place (*lex fori*).

Such administration is not affected by the domicile of the deceased.

In this Rule, the term "administration" does not include distribution. (p. 709.)

(B) DISTRIBUTION.

RULE 192.—The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death. (p. 712.)

CHAPTER XXXI.

SUCCESSION TO MOVABLES.

(A) INTESTATE SUCCESSION.

RULE 193.—The succession to the movables of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born, or
- (2) he died, or
- (3) he had his domicile of origin, or
- (4) the movables are, in fact, situate at the time of his death.
(p. 716.)

*(B) TESTAMENTARY SUCCESSION.**(i) Validity of Will.*

RULE 194.—Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid.
(p. 719.)

(ii) Invalidity of Will.

RULE 195.—Any will of movables which is invalid according to the law of the testator's domicile at the time of his death on account of—

- (1) the testamentary incapacity of the testator, or
- (2) the formal invalidity of the will (*i.e.*, the want of the formalities required by such law), or
- (3) the material invalidity of the will (*i.e.*, on account of its provisions being contrary to such law),

is (subject to the exceptions hereinafter mentioned, and to the effect of Rule 197) invalid. (p. 721.)

Exception 1.—Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of

being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either

- [1] by the law of the place where the same was made, or
- [2] by the law of the place where such person was domiciled when the same was made, or
- [3] by the laws then in force in that part [if any] of His Majesty's dominions where he had his domicile of origin. (p. 725.)

Exception 2.—Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made. (p. 729.)

SUB-RULE.—The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate. (p. 730.)

(iii) *Interpretation of Will.*

RULE 196.—Subject to the exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made. (p. 731.)

Exception.—Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country. (p. 732.)

(iv) *Effect of Change of Testator's Domicil after Execution of Will.*

RULE 197.—[Subject to the possible exception hereinafter mentioned] no will or other testamentary instrument [whether executed by a British subject or by an alien] shall be held to be revoked or to have become invalid, nor shall the construction

thereof be altered, by reason of any subsequent change of domicile of the person making the same. (p. 732.)

Exception.—A will which is invalid on account of material invalidity according to the law of the testator's domicile at the time of his death is invalid, although it may have been valid according to the law of the testator's domicile at the time of its execution. (p. 739.)

(C) *EXERCISE OF POWER BY WILL.*

(i) *Capacity.*

RULE 198.—A person may have capacity to exercise by will a power of appointment conferred by an English instrument, although he does not possess testamentary capacity under the law of his domicile.

The term "English instrument" in this Rule, and in the following Rules, means an instrument (*e.g.*, a settlement or a will) which creates a power of appointment and operates under English law. (p. 740.)

(ii) *Formal Validity.*

RULE 199.—A will of personal estate made in exercise of a power of appointment by will conferred by an English instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good exercise of the power where the will—

(1) complies with any of the following conditions as to form (that is to say)—

- (a) where the will is executed in accordance with the form required by the ordinary testamentary law of England, *i.e.* (if the will be made after the end of 1837), by the Wills Act, 1837; or
- (b) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicile; or
- (c) where the will is executed in accordance with any form which is valid under the Wills Act, 1861, *i.e.*, where the will is valid either

under Exception 1, or Exception 2, to Rule 195, or under Rule 197, *and* (2) is executed in accordance with the terms of the power as to execution. (p. 744.)

RULE 200.—Subject to the exception hereinafter mentioned, no will which does not satisfy the requirements of Rule 199 is a valid exercise of a power of appointment by will created by an English instrument. (p. 750.)

Exception.—A will executed in accordance with the form required by the Wills Act, 1837, is, so far as regards the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding that it shall have been expressly required, under the instrument creating the power, that a will made in exercise of such power should be exercised with some additional, or other, form of execution or solemnity. (p. 752.)

(iii) *Interpretation.*

RULE 201.—A general bequest contained in a will of personal estate is to be construed as an exercise of a general power of appointment.

This Rule applies to such bequest in the following cases, that is to say:—

Case 1.—Where the will is executed by a testator domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will.

Case 2.—Where the will is executed by a testator not domiciled in England in a form valid under the law of his domicil, unless it appears from the will that it was not intended to apply to property over which the testator has a power of appointment.

Case 3.—Where the will is executed by a testator not domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will. (p. 754.)

(iv) Material Validity.

RULE 202.—The operation of the exercise by will of a power of appointment, created either under an English or under a foreign instrument, depends (it would seem) in the case of

- (a) a special power of appointment, on the law which governs the operation of the instrument, and not on the law which governs the operation of the will;
- (b) a general power of appointment, on the law which governs the operation of the will, and not on the law which governs the operation of the instrument. (p. 758.)

CHAPTER XXXII.

PROCEDURE.

RULE 203.—All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest, the term “procedure” is to be taken in its widest sense, and includes (*inter alia*)—

- (1) remedies and process;
- (2) evidence;
- (3) limitation of an action or other proceeding;
- (4) set-off or counter-claim. (p. 761.)

INTRODUCTION.

THE purpose of this Introduction, which forms an integral part of this work, is to deal with three topics: first, the nature of the subject treated of in this Digest, and generally included under the title of the conflict of laws or of private international law; secondly, the proper method for the treatment of this subject; and thirdly, the general principles underlying the rules or maxims which collectively make up this branch of law.

I. NATURE OF THE SUBJECT

Most of the cases which occupy an English Court are in every respect of a purely English character; the parties are Englishmen, and the cause of action arises wholly in England, as where *A*, a London tradesman, sues *X*, a citizen of London, for the price of goods sold and delivered in London. When this is so, every act done, or alleged to be done, by either of the parties clearly depends for its legal character on the ordinary rules of English law.

Cases, however, frequently come before our Courts which contain some foreign element; the parties, one or both of them, may be of foreign nationality, as where an Italian sues a Frenchman for the price of goods sold and delivered at Liverpool; the cause of action, or ground of defence, may depend upon transactions taking place wholly or in part in a foreign country, as where *A* sues *X* for an assault at Paris, or on a contract made in France and broken in England, or where *X* pleads in his defence a discharge under the French bankruptcy law; the transactions, lastly, in question, though taking place wholly in England, may, in some way, have reference to the law or customs of a foreign country; this is so, for instance, when *A* wishes to enforce the trusts of a

marriage settlement executed in England, but which on the face of it, or by implication, refers to French or Italian law.

Whenever a case containing any foreign element calls for decision, the judge before whom it is tried must, either expressly or tacitly, find an answer to, at least, two preliminary questions.

FIRST QUESTION.—Is the case before him one which any English Court has, according to the law of England, a right to determine? (*a*).

The primary business of English tribunals is to adjudicate on transactions taking place in England between Englishmen, or at any rate between persons resident in England; or, briefly, to decide English disputes. There clearly may be matters taking place in a foreign country, or between foreigners, with which no English Court has, according to the law of England, any concern whatever; thus no Division of the High Court, and *a fortiori* no other English tribunal, will entertain an action for the recovery (*b*) of land in any other country than England. When, therefore, a case coming before an English judge contains a foreign element, he must tacitly or expressly determine whether it is one on which he has a right to adjudicate. This first question is a question of jurisdiction (*forum*).

SECOND QUESTION.—What (assuming the question of jurisdiction to be answered affirmatively) is the body of law with reference to which the rights of the parties are according to the principles of the law of England to be determined? (*c*).

Is the judge, that is to say, to apply to the matter in dispute (*e.g.*, the right of *A* to obtain damages from *X* for an assault at Paris) the ordinary rules of English law applicable to like transactions taking place between Englishmen in England, or must he, because of the "foreign element" in the case, apply to its decision the rules of some foreign law, *e.g.*, the provisions of French law as to assaults?

This second question is an inquiry not as to jurisdiction, but as to the choice of law (*lex*) (*d*).

(*a*) See chaps. iv. to xi., *post*.

(*b*) *Companhia de Moçambique v. British South Africa Co.*, [1893] A. C. 602.

(*c*) See chaps. xix. to xxxii., *post*.

(*d*) The two foregoing questions always require an answer whenever a case contains any foreign element. It is possible that the judge may be called upon to answer a third question, which, however, arises only where one of the parties bases his claim, or defence, upon the decision of a foreign Court, or, in technical language, upon a foreign judgment. See chaps. xii. to xviii., *post*.

The question which then arises and forms the third possible preliminary

Each of these inquiries, be it noted, must be answered by any judge, English or foreign, in accordance with definite principles; and, by an English judge, sitting in an English Court, in accordance with principles or rules to be found in the law of England. These rules make up that department of English law which deals with the conflict of laws, and may be provisionally described as principles of the law of England, governing the extra-territorial operation of law or recognition of rights (e). This branch of English law is as much part of the law of England as the Statute of Frauds or the Statute of Distributions. The subject, however, with which we are dealing is, partly from ambiguity of language, and partly from other causes, involved in so much obscurity of its own that we may well examine somewhat further into the nature of our topic, and look at the matter from a somewhat different point of view from the side whence we have hitherto regarded it.

The law of every country, as for example of England, consists of all the principles, rules, or maxims enforced by the Courts of that country under the authority of the State.

It makes no difference for our present purpose whether these principles be written or unwritten; whether they be expressed in Acts of Parliament, or exist as customs; whether they are the result of direct legislation, or are created by judicial decisions. Any rule or maxim whatsoever, which, when the proper occasion arises, will be enforced by the Courts of England under the authority of the State, is part of the law of England. Thus the rule that land descends to the heir, derived as it is from the Common Law; the rule that personal property goes to the next of kin, depending as it now does upon the Statute of Distributions; the principle that a simple contract is not valid without a consideration; or the doctrine, created as it is by judicial legislation, that the validity of a marriage ceremony, wherever made, depends

inquiry may be thus stated: Is the case one with which, according to the principles upheld by English Courts, the foreign Court delivering the judgment had a right to deal?

This again is a question of jurisdiction.

For the sake of simplicity it will be well for the moment to leave this third and occasional inquiry as much as possible out of sight, and to confine our attention to the two questions which, whenever a case containing any foreign element comes before an English judge, necessarily demand an answer.

(e) The expression "extra-territorial recognition of rights" as a description of the branch of law known as private international law was first employed by Professor Holland. See Holland, *Jurisprudence* (12th ed.), p. 424. See also p. 15, *post*.

on the law of the country where the marriage is celebrated, are each of them, however different in character and origin, rules enforced by English Courts, and therefore each of them both laws and part of the law of England.

The law of England, however, taken in its most extended and most proper sense, may, in common with the law of every civilised country, *e.g.*, of Italy or of France, be divided into two branches.

The first branch of the law of England may be described, if not with absolute precision, yet with sufficient accuracy for our present object, as the body of rules which regulate the rights of the inhabitants of England and determine the legal effect of transactions taking place between Englishmen within the limits of England. Indirectly, indeed, these rules may, under certain circumstances, affect transactions taking place abroad; their direct and immediate effect, however, is to regulate the actions of men and women living in England. They may, therefore, for the sake of distinction from the other branch or portion of English law, be called the "territorial" or "local" law of England. This territorial law constitutes indeed so much the oldest and most important part of English law that it has been constantly taken to be, and treated as, the whole of the law of the land. Blackstone's Commentaries, for example, though written with the avowed object of describing the whole of the "law of England," contain no mention of any rules which do not belong to the territorial or local law. With this branch of the law, important though it be, the writer on the conflict of laws has no direct concern.

The second branch of the law of England consists of rules which do not directly determine the rights or liabilities of particular persons, but which determine the limits of the jurisdiction to be exercised by the English Courts taken as a whole, and also the choice of the body of law, whether the territorial law of England or the law of any foreign country, by reference to which English Courts are to determine the different matters brought before them for decision.

These rules about jurisdiction and about the choice of law, which make up the second branch of the law of England, are directions for the guidance of the judges.

As to purely English transactions no such guidance can be needed. English Courts clearly have jurisdiction in respect of matters taking place within this country, for to determine the legal effect of such matters is the very object for which the Courts are constituted. The legal character, again, of acts done in England

by Englishmen must obviously be determined by reference to the territorial law of England, since the very object for which this law is created is to regulate the actions of Englishmen in England.

The rules therefore in question, since they are inapplicable to purely English transactions, must have reference to cases which contain, or may contain, some foreign element. They are, in fact, directions for the guidance of the judges when called upon to deal with transactions which, either because of the foreign character of one, or of both, of the parties, or because something material to the case has been done, or is intended to be done, in a foreign country, or has been done with reference to some foreign law, may, possibly at least, require for their fair determination, reference to the provisions of some foreign law. If, for the sake of convenience, we dismiss for the moment from our attention all questions of jurisdiction, this second branch of the law of England may be described in the following terms. It is that part of the law of England which provides directions for the judges when called upon to adjudicate upon any question in which the rights of foreigners, or the effect of acts done, or to be done, in a foreign country, or with reference to a foreign law, require determination. These directions determine whether a given class of cases (*e.g.*, cases as to contracts made in foreign countries) must be decided wholly by reference to the territorial law of England, or either wholly, or in part, by reference to the law of some foreign country, *e.g.*, France. Since these directions for the choice of law may provide either that the territorial law of England shall, under certain circumstances, govern acts taking place abroad, *e.g.*, the proper execution of a will made in France, by a testator domiciled in England, or that foreign law shall, under certain circumstances, govern acts done in England, *e.g.*, the proper execution of a will made in England by a testator domiciled in France, they may, as has been already intimated, be described as "rules for determining the extra-territorial operation of law," or better, "the extra-territorial recognition of rights" (*f*), and the branch of law with which we are concerned is, if we include within it both rules as to jurisdiction and rules as to the choice of law, nothing else than the subject generally treated of by English and American writers under the title Conflict of Laws, and by Continental authors under the title of Private International Law.

A mastery of this twofold division of the law of England (or for

(*f*) See Holland, *Jurisprudence* (12th ed.), p. 424.

that matter of any civilised country) puts a student on his guard against an ambiguity of language which, unless clearly perceived, introduces confusion into every discussion concerning the conflict of laws.

The term "law of a given country" (*g*), *e.g.*, law of England, or law of France, is an expression which, under different forms, necessarily recurs again and again in every treatise on private international law. It is further an expression which appears to be perfectly intelligible, and therefore not to demand any explanation. Yet, like many other current phrases, it is ambiguous. For the term "law of a given country" has, at least, two meanings. It may mean, and this is its most proper sense, every rule enforced by the Courts of that country. It may mean, on the other hand, and this is a very usual sense, that part of the rules enforced by the Courts of a given country which makes up the "local" or "territorial" law of a country. To express the same thing in a different form, the term "law of a country" may be used as either including the rules for the choice of law, or as excluding such rules and including only those rules or laws which, as they refer to transactions taking place among the inhabitants of a country within the limits thereof, are here called local or territorial law.

This ambiguity may be best understood by following out its application to the expression "law of England."

The term "law of England" may, on the one hand, mean every rule or maxim enforced or recognised by the English Courts, including the rules or directions followed by English judges as to the limits of jurisdiction and as to the choice of law. This is the sense in which the expression is used in the absolutely true statement that "every case which comes before an English Court must be decided in accordance with the law of England." The term "law of England" may, on the other hand, mean, not the whole of the law of England, but the local or territorial law of England excluding the rules or directions followed by English judges as to the limits of jurisdiction or as to the choice of law. This is the sense in which the expression is used in the also absolutely true statements that "the validity of a will executed in England by a Frenchman domiciled in France is determined by English judges not in accordance with the law of England but in accordance with the law of France," or that "a will of freehold lands in England, though executed by a foreigner abroad, will not be valid unless

(*g*) See chap. i., *post*, and App., Note 1, "Law of a Country, and the *Renvoi*."

executed in conformity with the law of England," *i.e.*, with the provisions of the Wills Act, 1837.

Hence the assertion that "while all cases which come for decision before an English Court must be decided in accordance with the law of England, yet many such cases are, and must be, decided in accordance, not with the law of England, but with the law of a foreign country, *e.g.*, France," though it sound paradoxical, or self-contradictory, is strictly true. The apparent contradiction is removed when we observe that in the two parts of the foregoing statement the term law of England is used in two different senses: in the earlier portion it means the whole law of England, in the latter it means the territorial law of England. This ambiguity is made plain to any one who weighs the meaning of the well-known dictum of Lord Stowell with regard to the law regulating the validity of a marriage celebrated in a foreign country. The question, it is therein laid down, "being entertained "in an English Court, it must be adjudicated according to the "principles of English law, applicable to such a case. But the "only principle applicable to such a case by the laws of England "is, that the validity of Miss Gordon's marriage rights must be "tried by reference to the law of the country, where, if they "exist at all, they had their origin. Having furnished this "principle, the law of England withdraws altogether, and leaves "the legal question to the exclusive judgment of the law of "Scotland" (*h*).

Let it further be borne in mind that the ambiguity affecting the term law of England affects the term law of France, law of Italy, and the like, and that with regard to statements where these terms are used, the reader should always carefully consider whether the expression is intended to include or to exclude the rules followed by the Courts of the given country, *e.g.*, France, as to the choice of law (*i*).

The general character of our subject being then understood, there remain several subordinate points which deserve consideration.

First. The branch of law containing rules for the selection of law is in England, as elsewhere, of later growth than the territorial law of the land.

(*h*) *Dalrymple v. Dalrymple* (1811), 2 Hagg. Const. 54, 58, 59, per Lord Stowell, then Sir William Scott. And see *Collier v. Rivaz* (1841), 2 Curt. 855, 858, judgment of Sir H. Jenner.

(*i*) See 1 Williams, Executors (11th ed.), pp. 271, 272, for a good statement of this ambiguity with reference to the expression "law of a deceased person's domicile."

The development of rules about the conflict of laws implies both the existence of different countries governed by different laws,—a condition of things which hardly existed when the law of Rome was the law of the civilised world,—and also the existence of peaceful and commercial intercourse between independent countries,—a condition of things which had no continuous existence during the ages of mediæval barbarism.

It was not, therefore, until the development of something like the state of society now existing in modern Europe that questions about the conflict of laws powerfully arrested the attention of lawyers. It is a fact of great significance that the countries where attention was first paid to this branch of law, and where it has been studied with the greatest care, have been countries such as Holland, Germany, Great Britain, or the United States, composed of communities, which, though governed under different laws, have been united by the force either of law or of sentiment into something like one State or confederacy. States of this description, such for example as the United Netherlands, both felt sooner than others the need for giving extra-territorial effect to local laws, and also found less difficulty than did other countries in meeting this necessity; since the local laws which the Courts applied were not in strictness foreign laws, but, from one point of view, laws prevailing in different parts of one State. In this matter the history of France supplies one of these instructive exceptions which prove the rule. France was never a confederacy, but the provinces of the monarchy were governed by different laws. Hence the call for determining the extra-provincial effect of customs raised judicial problems about the choice of law. It is also noteworthy that few English decisions bearing on our subject are of earlier date than the Union with Scotland. None are known to us earlier than the accession of James I.

Secondly. The growth of rules for the choice of law is the necessary result of the peaceful existence of independent nations combined with the prevalence of commercial intercourse. From the moment that these conditions are realised, the judges of every country are compelled by considerations of the most obvious convenience to exercise a choice of law, or, in other words, to apply foreign laws. That this is so may be seen from an examination of the only courses which, when a case involving any foreign element calls for decision, are, even conceivably, open to the Courts of any country forming part of the society of civilised nations.

The necessity for choosing between the application of different

laws might conceivably be avoided by rigid adherence to one of two principles.

The Courts of any country, *e.g.*, of England, might, on the one hand, decline to give any decision on cases involving any foreign element, *i.e.*, cases either to which a foreigner was a party, or which were connected with any transaction taking place wholly, or in part, beyond the limits of England.

No need for a choice of law would then arise, for the Courts would in effect decline to decide any question not clearly governed by the territorial law of England. This course of action would, however, exclude Englishmen no less than foreigners from recourse to English tribunals. For an Englishman who had entered into a contract with a Scotsman at Edinburgh, or with a Frenchman at Paris, would, if the principle suggested were rigidly carried out, be unable to bring an action in the English Courts for a breach of the contract. To which it may be added that, were the same principle adopted by the Courts of other countries, neither party to such a contract would have any remedy anywhere for its breach.

The English Courts might, on the other hand, determine to decide every matter brought before them, whatever the cause of action and wherever it arose, solely with reference to the local law of England, and hence determine the effect of things done in Scotland or in France, exactly as they would do if the transactions had taken place between Englishmen in England.

Difficulties about the choice of law would, by the adoption of this principle, be undoubtedly removed, since the sole rule of selection would be, that the territorial law of England must in all cases be selected, or, in other words, that there must be no choice at all. Gross injustice would, however, inevitably result as well to Englishmen as to foreigners. The object of a legal decision or judgment is to enforce existing rights, or give compensation for the breach thereof, and it is not the object of a legal decision or judgment to create new rights, except in so far as such creation may be necessary for the enforcement or protection of rights already in existence. But to determine the legal effect of acts done in Scotland or in France, *e.g.*, of a contract made between Scotsmen in Edinburgh, solely with reference to the local law of England, would be to confer upon one or other of the parties, or perhaps upon both, new rights quite different from those acquired under the agreement, or, in other words, to fail in the very object which it is sought to attain by means of a judgment. That this

is so becomes even more manifest if we place before our minds a case of which the foreign element consists in the fact that two persons have intended in some transaction to regulate their rights by reference to a foreign law. A and X, Englishmen, living in England, agree in London that certain property shall be settled, as far as English law allows, in accordance with the rules of French law. If in interpreting the settlement an English judge were to decline to take any notice of the law of France, he would clearly fail in carrying out the intention of the parties, or, in other words, would fail in ensuring to either of them his rights under the settlement.

If, therefore, it is impossible for the Courts of any country, without injustice and damage to natives, no less than to foreigners, either to decline all jurisdiction in respect of foreign transactions, or to apply to such transactions no rules except those of the local law, a consequence follows which has hardly been sufficiently noted. It is this: that the Courts of every civilised country are constrained, not only by logical, but by practical necessity, to concern themselves with the choice of law, and must occasionally give extra-territorial effect now to their own local law, now to the law of some foreign State.

Is, or is not the enforcement of foreign law a matter of "comity"? This is an inquiry which has greatly exercised the minds of jurists. We can now see that the disputes to which it has given rise are little better than examples of idle logomachy. If the assertion that the recognition or enforcement of foreign law depends upon comity means only that the law of no country can have effect as law beyond the territory of the sovereign by whom it was imposed, unless by permission of the State where it is allowed to operate, the statement expresses, though obscurely, a real and important fact. If, on the other hand, the assertion that the recognition or enforcement of foreign laws depends upon comity is meant to imply that, to take a concrete case, when English judges apply French law, they do so out of courtesy to the French Republic, then the term "comity" is used to cover a view which, if really held by any serious thinker, affords a singular specimen of confusion of thought produced by laxity of language. The application of foreign law is not a matter of caprice or option; it does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other States. It flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants,

whether natives or foreigners. It were well too in this matter to give heed to two observations. The first is that the Courts, *e.g.*, of England, never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws. The second observation is, that disputes about the effect of comity—and the remark applies to other controversies about the conflict of laws—have been confused by mixing together the question what, on a given subject, is the rule, or, in other words, the law which will be enforced by the judges, with the different inquiry, what are the motives which have led judges or legislators to adopt a particular rule as law. Assume, for the sake of argument, the truth of the doctrine that the enforcement of foreign laws depends upon comity. This dogma throws no light whatever on the nature of the rules upheld by English or other Courts as to the enforcement of foreign laws. To know, for example, that the Courts are influenced by considerations of comity is no guide to any one who attempts to answer the inquiry whether the tribunals of a given country accept “domicil,” as do English Courts, or “nationality,” as do Italian Courts, as determining the law which affects the validity of a will of movables.

Thirdly. Though the rules as to extra-territorial effect of law enforced by our Courts are part of the law of England, it should be noted that the law of every other civilised country, *e.g.*, of France, of Italy, or of Germany, contains rules for the choice of law, not indeed identical with, but very similar to, the rules for the same purpose to be found in the law of England.

That this should be so is natural. In any given case the laws among which a choice may rationally be made are limited in number (*k*). The selection of one or more of these laws is not a matter of caprice, but depends upon more or less definite reasons which are likely to influence all Courts and legislators. The grounds, for example, which induce the Courts of England to

(*k*) They may be reduced to five heads: (1) *Lex personalis*, or “the law of the country to which a person belongs,” either (a) by domicile (*lex domicilii*) or (b) by nationality (*lex ligentia*); (2) *lex actus*, or “the law of the country where a legal act takes place,” of which the *lex loci contractus*, or the law of the place where a contract is made, is a subdivision; (3) *lex loci delicti*, or “the law of the country where a wrong is committed;” (4) *lex loci solutionis*, or “the law of the country where a legal act (payment) is to be performed;” and (5) *lex fori*, or “the law of the country to which a Court belongs in which an action is brought, or other legal proceeding (*e.g.*, administration in bankruptcy) takes place.” Compare Holland, Jurisprudence (12th ed.), pp. 415, 416.

determine the formal validity of a contract, by the law of the place where it is made, are likely to weigh with the Courts of France or of Germany. There exists, moreover, a palpable convenience in the adoption by different countries of the same principle for the choice of law. Hence the mere fact that a particular rule for the selection of law has been followed by the French and American Courts is a valid though not absolutely decisive reason in favour of its being adopted by English Courts; and an appreciation of the advantages to be derived from uniformity has undoubtedly influenced both Courts and Legislatures, when called upon to determine in a given class of cases what should be the rule as to the extra-territorial effect of law. Thus has come into existence a body of rules which, though in different countries they exist as laws only by virtue of the law of each particular country, and though they are by no means everywhere identical, exhibit wherever they exist marked features of similarity. This likeness is increased by the fact that the object aimed at by the Courts of different countries, in the adoption of rules as to the extra-territorial effect of law, is everywhere in substance one and the same. This aim is, in the main, to secure the extra-territorial effect of rights. All, or nearly all, the rules as to the choice of law, which are adopted by different civilised countries, are provisions for applying the principle that rights duly acquired under the law of one country shall be recognised in every country. Thus, the law of England and the law of France seek in this respect the same object, viz., the securing that the rights which a man has attained by marriage, by purchase, or otherwise, *e.g.*, in Italy, shall be enforceable and enjoyable by him in England or France, and, conversely, that the rights which he has acquired in England may be enforceable and enjoyable by him in Italy. This community of the aim, pursued by the Courts and Legislatures of different countries, lies at the very foundation of our subject. It is of itself almost enough to explain the great similarity between the rules as to the choice of law adopted by different countries.

Fourthly. The department of law, whereof we have been considering the nature, has been called by various names, none of which are free from objection (*l*).

By many American writers, and notably by Story, it has been designated as the "conflict of laws." The apparent appropriateness of the name may be best seen from an example of the kind

(*l*) See Holland, *Jurisprudence* (12th ed.), pp. 417—424, for an account of the various names applied to rules for determining the choice of law.

of case in which a "conflict" is supposed to arise. *H* and *W*, Portuguese subjects, are first cousins. By the law of Portugal they are legally incapable of intermarriage. They come to England and there marry each other in accordance with the formalities required by the English Marriage Acts. Our Courts are called upon to pronounce upon the validity of the marriage. If the law of England be the test the marriage is valid; if the law of Portugal be the test the marriage is invalid. The question at issue, it may be said, is, whether the law of England or the law of Portugal is to prevail? Here we have a conflict, and the branch of law which contains rules for determining it may be said to deal with the conflict of laws, and be for brevity's sake called by that title.

The defect, however, of the name is that the supposed "conflict" is fictitious and never really takes place. If English tribunals decide the matter in hand, with reference to the law of Portugal, they take this course, not because Portuguese law vanquishes English law, but because it is a principle of the law of England that, under certain circumstances, marriages between Portuguese subjects shall depend for their validity on conformity with the law of Portugal. Any such expression, moreover, as "conflict," or "collision," of laws has the further radical defect of concealing from view the circumstance that the question by the law of what country a given transaction shall be governed is often a matter too plain to admit of doubt. No judge probably ever doubted that the validity of a contract for the purchase and sale of goods between French subjects made at Paris, and performed, or intended to be performed, in France, depends upon the rules of French law. The term "conflict of laws" has been defended on the ground of its applicability, not to any collision between the laws themselves, but to a conflict in the mind of a judge on the question which of two systems of law should govern a given case. This suggestion gives, however, a forced and new sense to a received expression. It also amounts simply to a plea that the term "conflict of laws" may be used as an inaccurate equivalent for the far less objectionable phrase "choice of law."

Modern English authors, and notably Mr. Westlake, have named our subject Private International Law (*m*).

(*m*) For by far the best statement known to us of the view that private international law is in reality one division of international law, see Pillet's most interesting *Principes de Droit International Privé*, chaps. iii. and iv. His argument deserves careful study.

This expression is handy and manageable. It brings into light the great and increasing harmony between the rules as to the application of foreign law which prevails in all civilised countries, such as England, France, and Italy. The tribunals of different countries, as already pointed out, follow similar principles in determining what is the law applicable to a given case, and aim at the same result, namely, the recognition in every civilised country of rights acquired under the law of any other country. Hence an action brought to enforce a right acquired under the law of one country (*e.g.*, of France) will in general be decided in the same manner in whatever country it be maintained, whether, that is to say, it be brought in the Courts of England or of Germany. On this fact is based the defence of the name Private International Law. The rules, it may further be said, which the words designate affect the rights of individuals as against one another, and therefore belong to the sphere of "private," not of public, law; and these rules, as they constitute a body of principles common to all civilised countries, may be rightly termed "international."

The term, however, is at bottom inaccurate. The words private international law "should mean, in accordance with that use of "the word 'international' which, besides being well established "in ordinary language, is both scientifically convenient and "etymologically correct, 'a private species of the body of rules "which prevails between one nation and another.' Nothing of "the sort is, however, intended; and the unfortunate employment "of the phrase, as indicating the principles which govern the "choice of the system of private law applicable to a given class of "facts, has led to endless misconception of the true nature of this "department of legal science" (*n*). Nor does the inaccuracy of the term end here. It confounds two classes of rules which are generically different from each other. The principles of international law, properly so called, are truly "international" because they prevail between or among nations; but they are not in the proper (*o*) sense of the term "laws," for they are not commands proceeding from any sovereign. On the other hand, the principles of private international law are "laws" in the strictest sense of that term, for they are commands proceeding from the sovereign of a given State, *e.g.*, England or Italy, in which they prevail; but they are not "international," for they are laws which determine

(*n*) Holland, *Jurisprudence* (12th ed.), pp. 422, 423.

(*o*) *I.e.*, from the point of view of Austinian jurisprudence, which, of course, is not accepted generally outside England.

the private rights of one individual as against another, and these individuals may, or may not, belong to one and the same nation. Authors, in short, who like Fœlix divide international law into public international law and private international law, use the words "international" and "law" in each of these expressions in a different sense. Such ambiguity of language, unless fully acknowledged, must lead, as it has led, to confusion of thought. Nor is much gained by such an amendment of terminology as is achieved by a transposition of words. The expression "international private law" (*p*) is no doubt a slight improvement on "private international law," as it points out that the rules which the name denotes belong to the domain of private law. But the name, improve it as you will, has the insuperable fault of giving to the adjective "international" a meaning different from the sense in which it is generally and correctly employed.

Other names for our subject, such as "comity," the "local limits of law," "intermunicipal law," and the like, have not obtained sufficient currency to require elaborate criticism. Their fault is that either they are too vague for the designation of the topic to which they are applied, or else they suggest notions which are inaccurate. Thus the term "comity," as already pointed out, is open to the charge of implying that a judge, when he applies foreign law to a particular case, does so as a matter of caprice or favour, whilst the term "intermunicipal law" can be accurately used only by giving to each half of the word "intermunicipal" a sense which both is unusual and also demands elaborate explanation. A more accurate description of our topic is (it is submitted) "the extra-territorial effect of law," or better, Professor Holland's phrase "the extra-territorial recognition of rights" (*q*). But such expressions are descriptions, not names. A writer, therefore, called upon to deal with our topic will act wisely in refusing to be tied down to any set form of words. He will, when convenient, use the admittedly inaccurate terms, conflict of laws, or private international law. But he will himself remember, and will attempt to impress upon his readers, that these names are nothing more than convenient marks by which to denote the rules maintained by the Courts of a given country, as to the selection of the system of law which is to be applied to the decision of cases that contain, or may contain, some foreign element, and also the rules

(*p*) See Bar, *Das Internationale Privat- und Strafrecht*.

(*q*) Holland, *Jurisprudence* (12th ed.), p. 424.

maintained by the Courts of a given country, as to the limits of the jurisdiction to be exercised by its own Courts as a whole or by foreign Courts.

II. METHOD OF TREATMENT.

The subject of the conflict of laws has been treated according to two different methods, which may, for the sake of distinction, be termed respectively the "theoretical method" and the "positive method."

The theoretical method has been adopted by a body of Continental writers, among whom by far the most distinguished is still Savigny. These authors differ from each other on many points of importance, but they display two common characteristics.

Starting from the facts that the rules of private international law which prevail in one country, as for example in England, are to a great extent the same as the rules maintained in other countries, as for example in France or Germany, and that, under the influence of modern civilisation, this similarity tends to increase, they consider private international law as constituting in some sense a "common law," tacitly adopted by all civilised nations. They of course do not deny that whatever force this common law possesses within England, or any other country, is derived from the authority of the sovereign thereof. Nor do they overlook the fact that the legislation or judicial decisions of different States deviate more or less from the principles of the supposed common law. Their doctrine is, that such deviations ought to be avoided, that the fundamental principles of private international law can be ascertained by study and reflection, and that the soundness of the rules maintained, say in England, as to the extra-territorial recognition of rights, can be tested by their conformity to, or deviation from, such general principles.

Hence, the next characteristic of the upholders of the theoretical method is agreement in the view, that the object of a writer on the conflict of laws is to discover the principles of this common law of Europe, and, starting from some one principle, as, for example, that we must "discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat);" (*r*) or that "the local law should be always applied by which vested rights are kept intact;" (*s*) or that "every

(*r*) Savigny, Guthrie's transl. (2nd ed.), p. 133.

(*s*) Wächter, ii. pp. 1—9.

legal relation must be judged according to the local law of that territory within which it has *come into existence*" (t), to show how in accordance with the fundamental principle assumed by the writer as the basis of his system, a consistent body of rules is, or might be, adopted by all nations for the determination of the questions proper to private international law. What may be the merit or demerit of the fundamental principles laid down by Savigny and others is, be it noted, not at present in question. What requires our attention is the aim proposed to themselves by the class of authors at whose head stands Savigny. Their object is to construct a logically consistent series of rules, which either actually do agree with the rules as to the choice of law upheld in different States, or ought, consistently with sound theory, to prevail in every State.

Authors who pursue this method pass almost imperceptibly from the question what are, to the different inquiry what ought to be, the principles of private international law. Neither Savigny, for example, nor Bar, professes to give to the readers of his treatise a mere enumeration or explanation of the principles, in reference to the extra-territorial recognition of rights, which are actually upheld by the Courts of one, or of all, the States of Europe. What each author attempts to provide is a statement of the principles which ought, as a matter of consistency and expediency, to guide the judges of every country when called upon to deal with a conflict of laws. In this point of view Bar's criticism on Story is full of instruction. "It will often," he writes, "be difficult for a reader to say from Story's discussion of a subject that the decision must, on legal principle, be what he pronounces it to be and none other—(*dass aber die Entscheidung juristisch so und nicht anders ausfallen müsse, wird ihm oft aus Story's Erörterung nicht klar werden*)" (u). The implied censure is just, if Story's aim was to show what ought, on general legal principles, to be the rules governing the conflict of laws. Whether this was his object is questionable. But, be this as it may, Bar's language gives us an accurate conception of the aim pursued by himself and other writers of the same school. They write with a view to

(t) Schäffner, s. 32. Compare Savigny, Guthrie's transl. (2nd ed.), pp. 146, 147.

(u) Bar (1st German ed.), s. 19. Compare Bar, *Private International Law*, Gillespie's transl. (2nd ed.), p. 47. The objects of a writer such as Pillet are really (1) to ascertain on what principles (if any) all civilised countries might adopt the same rules of private international law, and (2) to show that these principles have to a considerable extent been more or less consciously followed by the Courts and Legislatures of different civilised countries.

show what ought of necessity to be in any given case the rule of private international law.

The advantages of the theoretical mode of treatment, when employed by a man of genius, such as Savigny, are in danger of being underrated by English lawyers, to whose whole conception of law it is at bottom opposed. It is therefore a duty to bring these merits into prominence. The two great merits of the method are, first, that it keeps before the minds of students the agreement between the different countries of Europe as to the principles to be adopted for the choice of law, and next, that it directs notice to the consideration which English lawyers are apt to forget; that the choice of one system of law rather than of another for the decision of a particular case is dictated by reasons of logic, of convenience, or of justice, and is not a matter in any way of mere fancy or precedent. Whether, for example, the legal effect of a given transaction ought to be tested by the *lex actus*, the *lex domicilii*, or the *lex fori*, is a matter admitting of discussion, and which ought to be discussed on intelligible grounds of principle.

The defects of the *a priori* method are unlikely to escape Englishmen. It is not indeed, be it observed, fairly open to the objection which often suggests itself to English critics, that it takes no account of laws as they actually exist. The method is perfectly consistent with careful investigation into the rules as to the conflict of laws which in fact prevail in given countries, *e.g.*, France or the United States, since the actual practice of the Courts tests the correctness of theoretical speculation.

The true charge against the theoretical method is that it leads the writers who adopt it to treat as being law what they think ought to be law, and to lay down for the guidance of the Courts of every country rules which are not recognised as law in any country whatever. "The jurists of Continental Europe," writes Story, "have, with uncommon skill and acuteness, endeavoured to collect principles which ought to regulate this subject among all nations. But it is very questionable whether their success has been at all proportionate to their labour; and whether their principles, if universally adopted, would be found either convenient or desirable, or even just, under all circumstances" (x). This remark exactly hits the weak point of a method which rests on the assumption, common to most German jurists, but hardly to be admitted by an English lawyer, that there exist certain

(x) Story, Conflict of Laws, s. 26.

self-evident principles of right whence can be deduced a system of legal rules, the rightness of which will necessarily approve itself to all competent judges.

The positive method is followed by a whole body of authors, among whom Story is the most celebrated.

These writers, though they do not always quite consistently adhere to their own method, treat the rules of private international law in the main as part of the municipal law of any given country, *e.g.*, England or Italy, where they are enforced.

This school starts from the fact that the rules for determining the conflict of laws are themselves "laws" in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced. Story, therefore, and Fœlix do not practically concern themselves with any common law of Europe, but make it the object of their labours to ascertain what is the law of a given country with regard to the extra-territorial operation of rights. A writer of this class may with perfect consistency either limit his inquiries to the law of one country only, as for instance of England, or may extend his investigations to the ascertainment of the laws (with reference of course to his special topic) of Italy, of France, or of all the countries making up the civilised world. This, it may be added, is the course actually adopted by Fœlix, who, though writing with primary reference to the law of France, also states briefly the rules, with regard to the extra-territorial recognition of rights, to be found in the law of other countries, such as England or Germany. But, whatever be the limits imposed on the scope of their inquiries by writers who follow the positive method, the object of their labours is always in character the same. Their aim is to ascertain what are the rules contained in the law of a given country with regard to a special topic, namely, the extra-territorial recognition of rights. Hence it follows that these authors ought not, in so far as they act consistently with their own method, to attempt the deduction of the rules of private international law from certain general and abstract principles, for their aim is to discover not what ought to be, but what *is* the law. Thus the rule of the law of England, that status depends in the main on the law of a person's domicile, and the different rule laid down by the Italian Code, that status depends on the law of a person's State or nation, are not only different from, but in many cases opposed to, each other. Both, therefore, of the rules cannot, it is presumed, be necessary deductions from the same

general principle. Nor can both be articles of any common law of Europe. But to writers who follow the positive method, each rule is equally a part of private international law. They are both rules as to the choice of law: the one belongs to the municipal law of England, the other to the municipal law of Italy.

The merit of this mode of treatment is that it constantly impresses upon the minds both of writers and of readers, the truth of the all-important doctrine that no maxim is a law unless it be part of the municipal law of some given country, and that the proper means for ascertaining what is the law, say of England or France, with respect to the so-called "conflict of laws" is to study the statutory enactments and the judicial decisions which embody the law of England or France. The soundness of this method is shown by the consideration that writers of eminence pursue it in practice, even where they do not accept it in theory. Savigny and Bar have throughout their works chiefly in view the laws of Germany, or at any rate of those States whose jurisprudence has been influenced by Roman law. Westlake and Phillimore almost avowedly base their speculative conclusions on English or American judgments. References to the common law of Europe are, even by authors who regard it as in some sense the source of private international law, introduced mainly when, for want of judicial decisions or of statutory enactments, it is necessary to consider how a case ought to be decided which has not in fact occupied the Courts. Under such circumstances, which are not of rare occurrence, a writer is compelled to consider the question what in conformity with certain admitted principles ought to be the law applicable to a supposed case.

Here we touch on the weak side of the positive method.

It keeps in the background the extent to which civilised nations do in reality recognise certain common principles as properly governing the extra-territorial recognition of rights. It conceals further the fact that the number of well-established rules with regard to the choice of law to be found in the law of England, or of any other country, is small, and that, whenever a case arises falling under no rule prescribed by statute or by judicial precedent, judges must legislate, and do in fact legislate, with an eye to principles which, being adopted in other countries, may, by an allowable fiction, be styled the common law of Europe.

Still, the positive method is, whatever its defects, the mode of treating the rules of private international law which ought to be adopted by any one who endeavours to deal with them as a branch

of the law of England. Consistent adherence to this method, whilst it precludes the writer from the examination of several curious and interesting topics, such as the historical problems connected with the growth of private international law, relieves him from the necessity of justifying the maintenance of one rule rather than another as soon as it is ascertained to be part of the law of England. An expositor or commentator is not required to be an apologist. The systematic attempt, however, to state what the law is, is in no way inconsistent with an explanation of the grounds on which a rule rests. The part of the law of England which regulates the extra-territorial recognition of rights is no mere mass of incoherent maxims; it is rather a system of rules, all of which have a relation to one another. In the ascertainment of these rules, there will moreover be found, as we have already intimated, opportunities for the legitimate application of the theoretical method. Whenever, as often happens, neither the Statute Book nor the Reports contain any authoritative direction for the decision of a particular case, or rather of a particular class of cases, an intelligent inquirer must recur to the judgments of foreign Courts, and especially of American tribunals, and to the doctrines of authors such as Story or Savigny, whose opinions have, in fact, moulded the decisions of English judges. Such reference is justified, not by the fictitious authority of any common law of Europe, but by the consideration that English judges, when acting in a legislative capacity, rightly give weight to the opinion of eminent jurists, and are influenced by the wish to make the practice of our Courts correspond, in a matter which concerns all civilised States, with the practice upheld by foreign tribunals.

The adoption of the positive method fixes the path to be followed by an author whose business it is to determine the principles of English law with regard to the extra-territorial recognition of rights. He should pursue, as far as possible, the course adopted by English judges when it is their duty to decide any question which may raise a, so-called, conflict of laws.

They first consider whether the case falls within the terms of any Act of Parliament. If it does, there is no further room for discussion.

Thus, the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), validates marriages between parties, one of whom is a British subject, when celebrated abroad before a British Consul in the manner prescribed by that Act, and the Wills Act, 1861 (24 & 25 Viet. c. 114), determines the circumstances under which a will of

personalty is valid if executed in foreign parts by a British subject. Cases which fall within either of these statutes are, therefore, decided by our Courts solely and simply by reference to these statutes. The possibility or certainty that French tribunals might deny validity to a marriage celebrated in France in accordance with the Foreign Marriage Act, 1892, or that a French or other foreign Court might treat as void a will which nevertheless satisfied the requirements of 24 & 25 Vict. c. 114, is, as far as our Courts are concerned, an irrelevant consideration. Nor would they pay any attention to the unanimous opinion of jurists that the Foreign Marriage Act, 1892, or the Wills Act, 1861, violated the principles of the common law of Europe.

If a given case does not fall within the terms of an Act of Parliament, the next inquiry for a judge is whether it is covered by any principle to which precedent has given the authority of law. Show the existence of such a principle, and discussion is again closed.

It is now, for example, settled by a series of decisions that the question whether an action on a contract is barred by a statute of limitation must, in an English Court, be determined wholly by reference to the *lex fori*, *i.e.*, the ordinary or territorial law of England. When, therefore, the question is discussed whether the remedy on a foreign contract is barred by lapse of time, our Courts look wholly to the provisions of English statutes of limitations. On the matter referred to, the authority of text-writers and jurists is opposed to the rule established by English decisions. But the rule is now firmly established. It is part of the law of England, and no argument from the authority of Savigny, or of other eminent jurists, would induce an English judge to violate a rule which, were the matter *res integra*, our Courts might hesitate to adopt.

If, lastly, it happen that a case fall neither within the terms of any Act of Parliament, nor under any principle established by authority, English judges (who, under these circumstances, in effect legislate) look for guidance to foreign decisions, to the opinions of jurists, or to arguments drawn from general principles.

Thus, some years ago (*y*), the question arose whether a man born illegitimate, but legitimated in Holland by the subsequent inter-marriage of his parents, could, under the Statute of Distributions,

(*y*) *In re Goodman's Trusts* (1880), 14 Ch. D. 619; (1881), 17 Ch. D. (C. A.) 266. *Conf. Duncan v. Lawson* (1889), 41 Ch. D. 394.

succeed to the personal property of an uncle dying domiciled in England. The Court of Appeal held in effect that the case was not concluded by the terms of the statute, nor by precedent, and, falling back on general grounds of principle, determined that the legitimacy of the claimant depended on the law of his domicile (Holland) at the time of his birth, and that therefore he was, in England, a "legitimate" child, and entitled to succeed to the goods of his uncle.

The matter may thus be summed up: The sources from which to ascertain the law of England with regard to the extra-territorial recognition of rights, or, in other words, with regard to the rules of private international law, are, *first*, Acts of Parliament; *secondly*, authoritative decisions or precedents; *thirdly*, where recourse can be had neither to statutory enactments nor to reported decisions, then such general principles as may be elicited from the judgments of foreign Courts, the opinions of distinguished jurists, and rules prevalent in other countries.

These are the sources to which the judges refer when called upon to ascertain or fix the law. The only sound method for an English lawyer who attempts to write on private international law as part of the law of England is to follow judicial example and look exclusively to the sources of information recognised by the Courts. This, at any rate, is the method pursued throughout the present treatise.

III. GENERAL PRINCIPLES.

Jurisdiction and Choice of Law.

GENERAL PRINCIPLE No. I.—Any right (*z*) which has been duly acquired under the law of any civilised country is recognised and, in general, enforced by English Courts, and no right which has not been duly

(*z*) *Seemle*, this does not include a right depending solely on the rules of international law. "It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal Courts administer." *Cook v. Sprigg*, [1899] A. C. 572, 578, judgment of Privy Council; see also *Salaman v. Secretary of State for India*, [1906] 1 K. B. (C. A.) 613. To this exclusion, however, there is an exception in the case of rights arising from Prize Court proceedings. See also Keith, *Theory of State Succession*, pp. 13, 14.

acquired is enforced or, in general, recognised (*a*) by English Courts.

This proposition is the enunciation of a maxim or the statement of a fact—for it may be considered in either light—which lies at the foundation of the rules for determining the extra-territorial operation of law. Their object and result is to render effective in one country, *e.g.*, England, rights acquired in every other civilised country, *e.g.*, France or Italy. *A*, a Frenchman, marries a Frenchwoman at Paris, and has children by her. He originally acquires under the law of France, but in virtue of the principle we are considering, possesses also in England, the status and the position of a husband and of a father. If again, by sale, gift, descent, or otherwise, he becomes in France the owner of goods which he then brings to England, his rights of ownership obtain acknowledgment here, and he can in an English Court sue any wrongdoer who takes his property away from him. If further, *A* is assaulted by a German in Paris, and, under French law, has a claim to damages for the assault, he can, if he finds the aggressor in England, in general bring an action for the tort (*b*) in our Courts; and if *A*, instead of suing in England for the wrong, has obtained in a French Court a judgment (*c*) against the wrongdoer, he can, speaking generally, enforce his claim to be paid the money due under the judgment against the debtor in England. If, lastly, *A* and *X* have entered into a contract in France, and *X* breaks it, *A* can, if he finds *X* in England, bring an action against him for the breach of contract, and for the damage resulting to *A* therefrom; “where,” in short, “rights are acquired under the laws of “foreign States, the law of this country recognises and gives effect “to those rights, unless it is contrary to the law and policy of this “country to do so” (*d*), *i.e.*, unless the case falls within General Principle No. II. (*e*).

To illustrate further, or perhaps to illustrate at all, the application of a principle which is universally recognised may seem to lawyers superfluous. “I confess,” says Lord Halsbury (*f*), “I

(*a*) This principle must, of course, be understood as limited by the exceptions or limitations contained in Principle No. II.

(*b*) See chap. xxviii., *post*.

(*c*) See chap. xvii., *post*.

(*d*) *Hooper v. Gumm* (1867), L. R. 2 Ch. 282, 289, judgment of Turner, L. J.

(*e*) See p. 34, *post*.

(*f*) *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, at p. 335, per Lord Halsbury, L. C.

“have been somewhat surprised at the lengthy elaboration of principles which I should have thought by this time had been so far accepted as part of the English law that it was not necessary to enter into so elaborate a consideration of them. That one country will, under some circumstances, enforce contracts made in another, is a proposition I should have thought not requiring authority;” and the Chancellor’s dictum applies, in principle, not only to the enforcement of a contract made abroad, but also to the enforcement of any right acquired in a foreign country. To laymen, on the other hand, no amount of examples, which could conveniently be given, would convey an adequate conception of the frequency with which English Courts, as a matter of course and of every-day practice, acknowledge the existence of, and enforce, rights acquired whether by foreigners or Englishmen, under the laws of foreign countries. The recognition of rights acquired under foreign laws is a leading principle of modern civilisation; it has, however, received its full development only within comparatively recent times. For the whole branch of law with which we are concerned has, in England at least, come into existence within little more than a century. Hence the principle of the general recognition of acquired rights will not be found laid down in any of our older legal treatises, and it is now far more often tacitly assumed than expressly acknowledged as the foundation of judicial decisions. It is therefore a principle which requires very careful study, and there is little exaggeration in the assertion that, for the proper understanding of any sound theory as to the conflict of laws, every word of the proposition embodying the principle of the extra-territorial recognition of rights deserves attention.

(1) *Right*.—English judges, and the same thing holds good of, for instance, French or German judges, never in strictness enforce the law of any country but their own. Upon the occasions on which they are popularly said to enforce a foreign law, what they do, in reality, is, as already pointed out (*g*), to enforce not a foreign law, but a right acquired under the law of a foreign country. This distinction may appear at first sight a useless subtlety, but due attention to it removes difficulties which have perplexed both text-writers and Courts. At least half of the perplexities which have obscured the treatment by jurists of the law as to the enforcement of foreign judgments arise from the failure to appreciate this distinction. Thus it has been thought

(*g*) See p. 11, *ante*.

an anomaly that the Courts of one country, *e.g.*, England, should enforce the judgments given by the Courts of another country, *e.g.*, Italy, or, in other words, that tribunals acting under the authority of the King of England should enforce the commands of the King of Italy. What has not been noticed is that when *A* brings in England an action against *X* on an Italian judgment, our Courts are called upon to enforce not the judgment of the Italian Court, *i.e.*, the command of the King of Italy, but the right acquired by *A* under an Italian judgment to the payment of a debt by *X*. The enforcement of such a claim is neither more nor less anomalous than the enforcement by English tribunals of any other right arising under the law of a foreign country. For whether *A* claims from *X* the payment of a debt due under a contract, made and broken in Italy, or whether he claims the payment of money found by an Italian Court to be due from *X* to *A* for such breach of contract, he in either case demands in reality that an English Court should give effect to a right acquired by *A* under Italian law. Once admit the principle that English Courts in general recognise and enforce rights acquired under the law of a foreign country, and it becomes apparent that there is nothing anomalous or exceptional in their enforcement of a right, *e.g.*, to the payment of 20*l.*, acquired under a foreign judgment. The real point, we may observe in passing, which does require explanation is, not the recognition of rights acquired under a foreign judgment, but the fact that, even in the absence of fraud and the like, English Courts, in common with the tribunals of other countries, hold that rights may be acquired under some foreign judgments without having any claim to recognition. It is, in short, not the habitual recognition, but the occasional non-recognition, of rights acquired under foreign judgments which is, apparently at least, anomalous, and therefore needs explanation (*h*).

(2) *Acquired*.—The object for which Courts exist is to give redress for the infringement of rights. No Court intends to confer upon a plaintiff new rights, except in so far as new rights may be necessary to compensate for, or possibly to guard against, the infringement of an existing right. The basis of a plaintiff's claim is that, at the moment of his coming into Court, he possesses some right, *e.g.*, a right to the payment of 20*l.*, which has been violated; the bringing of an action implies, in short, the existence of a right

(*h*) As to this, see pp. 29—31, *post*.

of action. When, therefore, *A* applies to an English Court to enforce a right acquired in France, he must in general show that, at the moment of bringing his action, he possesses a right which is actually acquired under French law, and which he could enforce against the defendant if he sued the defendant in a French Court. *A* complains, for example, of the non-payment of a debt contracted by *X* in Paris, or seeks damages for an assault committed on him by *X* in Paris. To bring himself within the principle we are considering, he must show that his right to payment or to damages is actually acquired. *He must show that the debt is due under French law, or that the assault is an offence punishable by French tribunals. English law does not, speaking generally, apply to transactions occurring out of England; hence the foundation of *A*'s claim is that he wishes to enforce rights actually obtained in France, and he will, as a rule, fail to make out his case unless he can show that the grievance of which he complains is recognised as such by French law, or, in other words, unless he can show a right to redress recognised by the law of France (*i*).

Whether such a right actually exists, *i.e.*, whether *A* has an "acquired right," is a matter of fact depending upon the law of France and upon the circumstances of the case.

(3) *Duly*.—The word "duly" is emphatic. It fixes in effect the limit to the application of General Principle No. I. This principle is not that all rights in fact acquired under the law of any civilised country are generally enforceable in England, but only that rights which have been, in the opinion of English Courts, properly and rightly acquired, are generally enforceable here. The use of the word "duly" in General Principle No. I., in short, intimates that the mere possession of a right by *A* under the law of a foreign country, *e.g.*, of Italy, is not of itself the foundation for its enforcement, or even of its recognition, by English tribunals. The foundation is its due acquisition under the law of Italy. Thus our Principle implies that an English Court will not give effect to *A*'s undoubted right acquired under Italian law, *e.g.*, to be paid 20*l.* by *X*, unless the right be one which in the opinion of English judges ought to have been acquired by *A*, *i.e.*, unless it has been duly acquired.

(*i*) This is quite consistent with the rule that the *remedy* for a right acquired under French law may, *e.g.*, under a statute of limitation, be lost in France and exist in England, or *vice versa*. Questions as to procedure do not really depend upon the rights of the parties. No person has a vested interest in the course of procedure. See Wilberforce, *Statute Law*, p. 166.

What, then, is the test of due acquisition? The simplest answer is that rights actually acquired under Italian or any other foreign law are presumably, and until the contrary be shown, to be considered duly acquired; but that want of due acquisition may arise either from the conduct of the sovereign by whom the right is conferred, or, though this is a rare case, from the conduct of the person, *A*, by whom the right is acquired.

A, for example, has under Italian law acquired the rights of a husband with regard to *M*, or has acquired the right to be paid 20*l.* by *X*. The existence of these rights on *A*'s part in Italy is indisputable, and this for the best of all reasons, namely, that if *A* is in Italy the Courts will in fact recognise and enforce his rights and liabilities as *M*'s husband, and if *X* also is in Italy and in possession of property, will enable *A* to obtain payment of the 20*l.* due from *X*. What, then, are the circumstances either in the conduct of the Italian sovereign, or in the conduct of *A* himself, which will lead English Courts to treat the rights undoubtedly acquired by *A* as defective in due acquisition?

First, as to the conduct of the Italian sovereign.

The right conferred by the Italian sovereign and acquired by *A* may lack due acquisition because the right is one which, in the opinion of the English Courts, the King of Italy, acting either as legislator or as judge, has conferred without possessing proper authority to confer it. The Italian sovereign has in the supposed case acted, in the opinion of English Courts, *ultra vires*. The expression *ultra vires* is strictly accurate. A sovereign's authority, in the eyes of other sovereigns and the Courts that represent them, is, speaking very generally, coincident with, and limited by, his power. It is territorial (*k*). He may legislate for, and give judgments affecting, things and persons within his territory. He has no authority to legislate for, or adjudicate upon, things or persons (unless they are his subjects) not within his territory.

The Italian, or any other, sovereign may exceed his acknowledged *legislative* authority.

This kind of excess is rare. The laws of a country apply in general solely to transactions taking place within its borders, or, if they have extra-territorial operation, usually affect only a sovereign's own subjects. But a sovereign's authority to legislate for his own territory, and (with certain qualifications) for his own

(*k*) *Ex parte Blain* (1879), 12 Ch. D. 522; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263; *Macleod v. Attorney-General for New South Wales*, [1891] A. C. 455. See General Principle No. III., p. 40, *post*.

subjects, is undisputed. Still, cases of legislative action which may be considered *ultra vires* can be found. Thus English Courts do not acknowledge rights which ultimately depend upon the claim of the French sovereign power to determine in accordance with French law the formal validity of a marriage entered into by a French citizen in England (*l*). French tribunals do not, as far as French subjects are concerned, admit the validity of marriages celebrated in France under the Foreign Marriage Act, 1892; and there is no reason to doubt that English Courts would be very slow to admit the validity in England of foreign legislation resembling the Foreign Marriage Act, 1892, or of a foreign law framed on the lines of the Royal Marriage Act, 12 Geo. III. c. 11, at any rate, if the parties affected by it were domiciled in England.

The Italian sovereign, again, or any other, may exceed his acknowledged *judicial* authority.

This kind of excess is common. Few things are more disputable than the limits within which the Courts of a country have a right to exercise jurisdiction. The plain truth is—and this holds good of England no less than of other States—that every country claims for its own Courts wider extra-territorial authority than it willingly concedes to foreign tribunals (*m*). Hence it constantly happens that rights acquired under foreign judgments are refused enforcement on the ground that they are not “duly” acquired.

X, a Swiss subject, enters into an agreement with A, a French citizen resident in France. X, at the time when the contract is made, is staying at Paris for a week’s visit. He generally lives in England; his domicile is Swiss. A sues X before a French Court for breach of contract. X receives no notice of the action, and is absent during its continuance. A recovers judgment against X for, say, 1,000*l*. He brings an action on the judgment in Eng-

(*l*) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

(*m*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155. “We admit, with perfect candour, that in the supposed case of a judgment, obtained in this country against a foreigner under the provisions of the Common Law Procedure Act, being sued on in a Court of the United States, the question for the Court of the United States would be, Can the Island of Great Britain pass a law to bind the whole world? We think in each case the answer would be, No, but every country can pass laws to bind a great many persons.” *Ibid.*, p. 160, *per curiam*. *Schibsby v. Westenholz* affords an example of legislative and judicial excess of authority. The English Courts under an Act of the English Legislature were authorised, and, indeed, bound to exercise a jurisdiction which English judges did not believe that foreign Courts would admit to be within the proper authority of the British sovereign.

land; he fails in his action. The ground of the failure is, that the English Court denies the jurisdiction of the French Court, or in effect holds that a right certainly acquired under French law has not been "duly" acquired.

A is a domiciled Englishman married to *M*; he goes to Germany, stays there a week, obtains a divorce from *M*, and during her lifetime marries *N*. In Germany he is *N*'s lawful husband, but his right to marry her and all rights depending thereupon are in the view of English Courts not duly acquired, and therefore cannot be enforced in England (*n*).

Secondly, as to *A*'s own conduct. *A* has acquired a right to the payment of 20*l.* to him by *X* under Italian law, *e.g.*, under an Italian judgment. That his right exists in Italy is indisputable. The right, moreover, is one which the Italian sovereign has full authority to confer. *A*, however, has obtained the judgment by fraud. In this case his right is not "duly" acquired, and, on proof of the fraud, will not be enforced by the English Courts (*o*).

(4) *Civilised Country*.—This term is of necessity a vague one; it may for our present purpose be treated as including any of the Christian States of Europe, as well as any country colonised or governed by such European State, at least in so far as it is governed on the principles recognised by the Christian States of Europe.

England, France, Mexico, the United States, and British India, in so far as governed by British law, are civilised countries. Turkey and China are not civilised States within the meaning of this Rule. The reader should, however, note that the proposition on which I am commenting is simply an affirmative and limited statement; it neither affirms nor denies anything as to the recognition of rights acquired under the laws of countries which are not civilised (*p*).

(*n*) See *Lolley's Case* (1812), 2 Cl. & F. 567 (*n.*); *Shaw v. Gould* (1868), L. R. 3 H. L. 55. See further on this subject, General Principle No. III., p. 40, *post*, as to the test of jurisdiction.

(*o*) See *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. (C. A.) 295; *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310. There are few (if any) cases in which *A*'s conduct militates against the due acquisition of a right conferred by a sovereign who has authority to confer it, except the case of a judgment obtained by fraud. Still other instances are conceivable. If *A* procured by bribery the passing of an Act by an American State Legislature which gave him rights against *X*, it is possible that, on the bribery being proved, English Courts would refuse to enforce the rights given *A* by such Act.

(*p*) See App., Note 2, "Law governing Acts done in Uncivilised Countries."

The reason why the rule as to the recognition of acquired rights is limited, so as to apply to civilised countries only, is that the willingness of one State to give effect to rights gained under the laws of other States depends upon the existence of a similarity in principle between the legal and moral notions prevailing among different communities. Rules of private international law can exist only among nations which have reached a similar stage of civilisation. That English Courts will recognise rights acquired under the law of Italy or of France is certain. That English Courts will recognise rights acquired under the law of China (*q*), under the peculiar legislation or customs of the Territory of Utah (*r*), or under the customary law of Bechuanaland (*s*), is, to say the least, uncertain. The treatment of the rules as to the extra-territorial effect of law is freed from unnecessary perplexity by excluding from it all reference to the question how far English Courts may, or may not, give effect to the laws of non-civilised communities (*t*).

(5) *Recognised and enforced* (*u*).—The distinction between the recognition and the enforcement of a right deserves notice.

A Court recognises a right when for any purpose the Court treats the right as existing. Thus, if *A*, a Frenchman, marries *M*, a Frenchwoman, in Paris, and they then come to England, our Courts treat acts done by *A* in regard to *M* as lawful because he is her husband which would be unlawful if done by a man not married to *M*. Our Courts therefore recognise *A*'s rights under French law as *M*'s husband. So whenever an English judge considers *A*'s appointment as guardian of *M* by an Italian

(*q*) *Conf. Attorney-General v. Kwok-A-Sing* (1873), L. R. 5 P. C. 179; *Re Tootal's Trusts* (1883), 23 Ch. D. 532.

(*r*) *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130.

(*s*) *Bethell v. Hildyard* (1888), 38 Ch. D. 220, with which contrast *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

(*t*) Our principle is, as has been said, only affirmative, and does not negative the probability of English Courts recognising rights gained under the law of Turkey or China. It should be noted, further, that the principle leaves quite untouched the inquiry how far English Courts may apply the law of England to rights which, if they exist at all, arise from transactions taking place in countries which are strictly barbarous. Whether, if *X* assaults *A* within the territory of a petty negro chief, he has a right of action against *X* in the High Court of Justice, is a problem of some curiosity, but its solution does not fall within the scope of our general principle. Compare *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358; [1893] A. C. 602. See App., Note 2, "Law governing Acts done in Uncivilised Countries."

(*u*) Compare, for this distinction, Piggott, *Foreign Judgments* (3rd ed.), chap. i.

Court as a reason (though not, it may be, a conclusive reason) for appointing him *M*'s guardian in England, the judge recognises *A*'s rights or status as guardian under Italian law. So, to give another example, a Court recognises *A*'s rights as owner of land in France when treating an agreement made by him in England in reference to such land as a good consideration for a promise made to him by *X*.

A Court enforces a right when giving the person who claims it either the means of carrying it into effect, or compensation for interference with it.

It is plain that while a Court must recognise every right which it enforces, it need not enforce every right which it recognises.

Now English Courts generally recognise rights acquired in a foreign country, and often enforce them. But our Courts constantly recognise rights which they do not enforce. Thus they will treat *A*, a Frenchman, married to *M* in France, as her husband, but it certainly cannot be asserted that they will enforce against *M* all the rights which *A* as her husband may possess against *M* under French law. So again, *A*'s ownership of land in France receives for many purposes legal recognition in England. But no English Court will determine *A*'s title to French land, or attempt to put him into possession of a house in Paris, or give him damages for a trespass on his land at Boulogne.

(6) *English Courts*.—These words are inserted in the proposition under consideration, though it might easily be stated in a more general form, for the sake of emphasising the fact that the principles of private international law are dealt with in this treatise as part of the law of England.

It may be well to note that English Courts expect foreign tribunals to recognise rights acquired under English law, and occasionally attempt by indirect means to enforce such recognition.

Principle No. I., when fully understood, will be seen to be the foundation on which rests, if not strictly the whole, by far the greater part of the rules for determining the extra-territorial effect of law. English Courts do, as a matter of fact, recognise, and to a great extent enforce, rights acquired under the laws of other countries, *e.g.*, France and Italy, and the various rules for dealing with the so-called conflict of laws are mainly rules for determining the law under which a given right is acquired, or the extent to which English Courts shall enforce a right acquired under a foreign law.

The stress laid here on the recognition given by the Courts of

one country to rights which have been acquired, or have vested, under the law of any other civilised country is open to one grave objection. The doctrine may seem to be opposed to a criticism of Savigny's on the analogous theory that "that local law" "should always be applied by which vested rights shall be kept intact."

"This principle," he writes, "leads into a complete circle; for we can only know what are vested rights if we know beforehand by what local law we are to decide as to their complete acquisition" (*x*).

The opposition, however, is only apparent. Savigny is searching for a principle which may enable a judge to say whether a given case is to be determined by the law, for instance, of France or of England. Whether any one such criterion can be found may admit of doubt. What is perfectly clear is that, for the reason stated by Savigny, the principle of the enforcement of vested rights does not supply such a universal test. To admit this, however, is quite consistent with maintaining that this principle does define the object in the main aimed at by rules having reference to the conflict of laws, or to the extra-territorial effect of rights (*y*).

The negative side of Principle No. I. is all but self-evident. If the aim of English Courts in maintaining the rules of so-called private international law be the recognition of duly acquired rights, it almost necessarily follows that English Courts will not recognise any right which they do not consider duly acquired.

In the application further of Principle No. I. we must constantly bear in mind that, though the principle is for the sake of clearness stated in an absolute form, it is subject to important exceptions or limitations, the definition whereof is a matter of extreme nicety and difficulty. They are embodied in Principle No. II. Principle No. I., therefore, must always be understood subject to the effect of General Principle No. II.

(*x*) Savigny, Guthrie's transl. (2nd ed.), p. 147.

(*y*) Savigny has underrated the utility of this principle even for the determination of the law applicable to the solution of particular cases. In hundreds of instances no difficulty exists in fixing what is the country under the law whereof a right (if it exist at all) has vested. *A* sues *X* for the price of goods sold and delivered by *A* to *X* in a shop at Paris; both parties are Frenchmen. The right to the payment of the debt clearly vests (if at all) under French law.

GENERAL PRINCIPLE NO. II.(z).—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country :

(A) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation (*a*) ;

(B) Where the enforcement of such right is inconsistent with the policy of English law (*b*), or with the moral rules upheld by English law (*c*), or with the maintenance of English political institutions (*d*) ;

(C) Where the enforcement of such right involves interference with the authority of a foreign sovereign within the country whereof he is sovereign (*e*).

Principle No. II. contains the exceptions (*f*) to Principle No. I.; and enumerates in very general terms the rights which, though duly acquired under the law of a foreign country, English Courts will not enforce, or allow to operate in England.

(A) *Inconsistency with Statute of Imperial Parliament*.—If an Act of the Imperial Parliament is intended to have operation in

(z) As to the whole of this principle, see especially Savigny, s. 349, Guthrie's transl. (2nd ed.), pp. 76, 77.

(*a*) The Foreign Marriage Act, 1892; The Royal Marriage Act, 1772 (see chap. xxvii., *post*); The Wills Act, 1861 (see chap. xxxi., *post*).

(*b*) *Brook v. Brook* (1861), 9 H. L. C. 193; *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275, compared with *Peurce v. Brooks* (1866), L. R. 1 Ex. 213. This head is illustrated by every case in which procedure is treated as depending on *lex fori*. See chap. xxxii., *post*.

(*c*) *Cranstown v. Johnston* (1796), 3 Ves. 170; 3 R. R. 80; *Kaufman v. Gerson*, [1904] 1 K. B. (C. A.) 591; *Société des Hôtels Réunis v. Hawker* (1913), 29 T. L. R. 578; (1914), 30 T. L. R. (C. A.) 423.

(*d*) *Sommersett's Case* (1771), 20 St. Tr. 1; *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *The Halley* (1868), L. R. 2 P. C. 193.

(*e*) See especially *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358; [1893] A. C. 602. Hence it is not the duty, as it is not within the power, of an English Court to enforce in a foreign country obedience to the law of such foreign country. "*Morocco Bound*" *Syndicate, Ltd. v. Harris*, [1895] 1 Ch. 534.

(*f*) These exceptions come near to what is meant by foreign writers when they lay down that the Courts of a given country, *e.g.*, France, will not enforce any rights in France which are opposed to the rules of public order. Compare as to the vagueness of this term, Pillet, *Principes de Droit International*, pp. 367—374.

foreign countries, an English Court will as far as possible enforce it, and therefore will not give effect to rights inconsistent with such a statute. Thus the Foreign Marriage Act, 1892 (*g*), validates marriages made in accordance with its provisions in foreign countries between parties one of whom at least is a British subject. The Act cannot of its own force operate in France, and French judges have treated as invalid marriages between a British subject and a French citizen celebrated in France under a similar enactment. But an English judge must of necessity hold such a marriage valid. If *A*, a British subject, and *M*, a French citizen, marry in France under the provisions of the Foreign Marriage Act, 1892, and *A* subsequently during *M*'s lifetime marries *N*, the latter marriage may be held valid in France, but English Courts will not admit its validity, and will not therefore in England enforce rights claimed by *A* or his descendants in virtue of the marriage with *N*. So, again, if *D*, a British subject, makes a will at New York which is valid under the Wills Act, 1861 (*h*), it will be supported as far as the English Courts can do so in England, even though *D* being domiciled in New York, the Courts of that State should hold it invalid for not complying with some provision of New York law; in other words, English Courts will not enforce any rights of *A* acquired under the law of New York inconsistent with the validity of *D*'s will, or, in other words, inconsistent with the provisions of the Wills Act, 1861.

(B) *Inconsistency with Policy of English Law, &c.*—Under this very general head (*i*) come a variety of instances which it is hard to refer to any narrower class. They have all this one common characteristic, that they are cases in which English Courts refuse to enforce in England rights which conflict with the fundamental ideas on which English law is grounded, or which are inconsistent with the maintenance of English institutions. The

(*g*) See chap. xxvii., Rule 182, p. 661, *post*.

(*h*) See chap. xxxi., Exception 1 to Rule 195, *post*.

(*i*) Under this principle may be brought, not precisely in form but in substance, the anomalous refusal of English Courts to treat as invalid a contract made in violation of a foreign revenue law. (See Bar, Gillespie's transl. (2nd ed.), pp. 290, 560.) In other words, English Courts would not discourage smuggling into or out of another country, when it violated only the laws of such country and might be favourable to English trade. Whether this non-recognition of foreign revenue laws would now be upheld by English Courts is perhaps open to question; it certainly applies only to the laws of a strictly "foreign" country, *i.e.*, a country not part of the British dominions.

expression "policy of English law" is very vague, but a more precise term would hardly include all the cases which it is necessary to cover. The expression, moreover, is familiar to English lawyers. The chief instances which the general head is intended to include may perhaps be enumerated under five classes. It will be found that, in general, the right which English Courts refuse to enforce, on account of its inconsistency with the policy of English law, conflicts either with the *morality* supported by English Courts, the *status* of persons in England, rights with regard to English *land*, English rules of *procedure*, or, lastly, English law as to what constitutes a *tort*.

Morality. English Courts refuse to give legal effect to transactions, wherever taking place, which our tribunals hold to be immoral. Thus a promise made in consideration of future illicit cohabitation, or an agreement which, though innocent in itself, is intended by the parties to promote an immoral purpose (*k*), or a promise obtained through what our Courts consider duress or coercion (*l*), is according to English law based on an immoral consideration. Such a promise or agreement, therefore, even were it valid in the country where it was made, will not be enforced by English judges. The similarity, however, between the moral principles prevailing in all civilised countries is now so great that the instances are of necessity rare in which English tribunals can be asked to treat as immoral transactions which in a foreign country give rise to legal rights.

Note, nevertheless, that English law may forbid the carrying out in England of transactions which our Courts do not hold to be immoral when taking place abroad. When, for example, the usury laws made the taking of interest above five per cent. illegal, it was still possible to recover in England interest above that amount on loans made in India (*m*); and not many years have passed since a contract made in Brazil for the sale of slaves, and there legal, was held to give rise to rights enforceable by English Courts (*n*).

(*k*) *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275; *Pearce v. Brooks* (1866), L. R. 1 Ex. 213.

(*l*) *Kaufman v. Gerson*, [1904] 1 K. B. (C. A.) 591. And see App., Note 3, "Case of *Kaufman v. Gerson*"; *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1921), 37 T. L. R. (C. A.) 777; [1921] 3 K. B. 532.

(*m*) *Bodily v. Bellamy* (1760), 2 Burr. 1094.

(*n*) *Santos v. Illidge* (1860), 29 L. J. C. P. 348; 8 C. B. (N. S.) (Ex. Ch.) 861.

Status (o). English Courts do not recognise in England any penal (or privative) status arising under a foreign law, as, for example, the status of civil death, or the civil disabilities or incapacities which may be imposed on priests, nuns, Jews, Protestants, slaves, or others, by the law of the country to which they may belong; nor (it would seem) do our Courts recognise in England any status unknown to our law, as, for example, relationship arising from adoption (*p*).

This non-recognition, *e.g.*, of a penal status must be confined to its effect in England. Civil death is unknown to English law. But if, under the law of a foreign country where civil death is recognised, the effect of a person's civil death were to transfer his property there situate to his heir, English law would, it is submitted, recognise the legal effect of such transfer, at any rate in the case of a person domiciled in a foreign country, and in England treat the heir as lawful owner of property which he had acquired through the civil death of his relative.

Land in England (q). Rights with regard to English land are as a rule (*r*) determined wholly by the ordinary local law of England.

Matters of Procedure (s). The rights as respects procedure of the parties to a suit are utterly unaffected by any foreign law. If A, a Frenchman, sues X, a German, on a contract made in Italy, in the High Court of Justice, he stands, as regards procedure, exactly in the same position as that occupied by Jones, a citizen of London, when he sues Brown, also a Londoner, for the price of goods sold and delivered. To the idea of "procedure," moreover, our Courts give the widest extension. It includes process, evidence, rules of limitation, remedies, methods of execution, and the like. The reason of this is clear. The practice of a Court is determined by the views entertained in the country to which the Court belongs of the right method of compelling the attendance of the parties, of obtaining evidence, and so forth, and the fact that the claim brought before the Court contains a foreign element is no reason

(o) See chap. xix., Rule 136, p. 500, *post*.

(p) See also Rule 136, p. 502, *post*. The recognition of the principle of adoption has recently been recommended by a governmental committee; see the Report of the Committee on Child Adoption, 1921, Parliamentary Paper, Cmd. 1254.

(q) See chap. xxiii., *post*.

(r) To this rule there is a constantly increasing number of exceptions. See App., Note 4, "Decreasing Influence of the *Lex situs*."

(s) See chap. xxxii., *post*.

why the Court should adopt methods of enforcing the plaintiff's right differing from the methods which the Court, or rather the sovereign under whose authority the Court acts, holds to be best adapted for the purpose in hand. Matters of procedure are in no sense rights of individuals, they are practices of a Court adopted in accordance with the Court's general views of expediency or of justice.

Torts. No act done (*t*) in a foreign country, *e.g.*, Italy, can be sued for as a tort in England unless it both is a wrongful, that is, an unjustifiable, act under the law of Italy, and would also have been a wrong if it had been done in England. *A*, for example, sues *X* in England for a libel published by *X* of *A* in Italy. He must, in order to maintain his action, establish that the defamatory statement is one which is wrongful, or more strictly unjustifiable, by the law of Italy; he must also make out that the statement is one which, if published in England, would render *X* liable to proceedings for libel (*u*).

This rule is somewhat complicated. It is, however, explainable. Let us follow out our illustration of an action in England by *A* against *X* for a libel published in Italy.

English law does not extend to Italy, and it clearly would be monstrous for English Courts to give damages, *i.e.*, inflict punishment, for an act done in Italy which Italian law holds innocent or, it may be, praiseworthy. It is, therefore, necessary for *A* to show that the transaction in respect of which he claims damages from *X*, is a transaction which, at lowest, is treated as wrongful (*x*) by Italian law. English Courts, on the other hand, will not give damages for—*i.e.*, in effect punish—acts which English law holds innocent or, it may be, praiseworthy, for to do so would be inconsistent with the moral rules upheld by English law. *A* must, therefore, show that the statement complained of would have been libellous if published in England.

(*t*) See chap. xxviii., *post*.

(*u*) See *The Halley* (1868), L. R., 2 P. C. 193; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1.

(*x*) Logically it might seem that in order to make the defamatory statement actionable in England, *A* ought to show that it was actionable, in the strict sense of that word, in Italy, *i.e.*, that in Italy it gave *A* a right of action against *X*. This was at one time the view entertained by eminent English judges. Our Courts have now determined that it is enough if *A* shows that the statement of which he complains is not held justifiable or innocent by the law of Italy. *Machado v. Fontes*. [1892] 2 Q. B. (C. A.) 231; and see further chap. xxviii., *post*.

(C) *Interference with Authority of Foreign Sovereign*.—An English Court will not give effect to rights which cannot be enforced without the doing of acts in another country inconsistent with the supremacy of the sovereign thereof.

This is the rational though probably not the historical ground on which our Courts decline to entertain an action with regard to the title to foreign land.

Principle No. II. (C) extends to land which, though within the dominions of the British sovereign, is not within the territorial limits of the jurisdiction of the English Courts, such, for example, as land in Scotland or Canada.

The exceptional cases in which Courts of equity have dealt with rights over foreign (*y*) land are exceptions which prove or elucidate the rule. The basis of interference by Courts of equity has, mainly at least (*z*), been the possibility of acting in England directly upon the owner of the land, and of thus indirectly dealing with foreign land without doing any act within the limits of a foreign country.

Principle No. II. contains, as already pointed out, the exceptions to Principle No. I. They are, many of them, both of theoretical and of practical importance. Still, it should be borne in mind that exceptions are exceptional,—a truism which is constantly overlooked,—and are in truth of far less importance than the rule which they modify or limit. As regards the conflict of laws, the essential matter is to keep the mind firmly fixed on the general recognition of vested rights in accordance with or under Principle No. I. It is the basis on which are founded most of the rules of private international law.

Principle No. I. and Principle No. II. are the primary principles of our subject, and apply both to jurisdiction and to choice of law. From these two principles (*i.e.*, from Principle No. I., taken in combination with the exceptions thereto) are derived the four other General Principles treated of in this Introduction; they may, as compared with General Principles No. I. and No. II., be regarded as derivative or secondary principles.

Of these four derivative or secondary principles, two, *viz.*, General Principles Nos. III. (*a*) and IV. (*b*), refer to jurisdiction; they are the principles which in the main determine both the juris-

(*y*) See term "foreign," pp. 67, 71, *post*.

(*z*) See, however, *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; Rule 53, Exception, p. 226, *post*.

(*a*) See p. 40, *post*.

(*b*) See p. 44, *post*.

diction exercised by the High Court itself, and the jurisdiction which, in the opinion of the High Court, is properly exercisable by the Courts of a foreign country. General Principles Nos. III. and IV. may therefore be aptly termed the criteria, or tests, of jurisdiction; they are in effect tests for determining whether the Courts of a particular country are, in a given matter, Courts of competent jurisdiction (*c*), and govern the Rules stated in Book II.

Of the four derivative or secondary General Principles already referred to, two, viz., General Principles Nos. V. and VI., apply to the Choice of Law, and govern the rules stated in Book III.

Jurisdiction (d).

GENERAL PRINCIPLE No. III.—The sovereign of a country, acting through the Courts thereof, has jurisdiction over (*i.e.*, has a right to adjudicate upon) any matter with regard to which he can give an effective judgment, and has no jurisdiction over (*i.e.*, has no right to adjudicate upon) any matter with regard to which he cannot give an effective judgment (*e*).

For the proper understanding of this Principle attention should be paid to two preliminary observations.

(*c*) The term "Court of competent jurisdiction" is ambiguous.

(1) It may mean a "Court belonging to a country whose sovereign may, in the opinion of the tribunal called upon to decide the matter, rightly determine, or adjudicate upon, a given case or class of cases."

When used in this sense the term refers to the "extra-territorial," or as it is sometimes called, "international," competence of the sovereign of a particular country, when acting judicially, or, in other words, to the extra-territorial competence of the Courts of that country.

The term Court, or Courts, of competent jurisdiction is, unless the contrary is stated, used throughout this treatise in its extra-territorial sense.

(2) The term may mean a "Court to which the sovereign of a particular country has given authority to adjudicate upon a given case or class of cases."

When used in this sense the term refers to intra-territorial competence.

With questions of intra-territorial competence this treatise has no concern, and the term Court, or Courts, of competent jurisdiction is not used therein in its intra-territorial sense.

For the further discussion and illustration of the meaning of the term "Court of competent jurisdiction," see Rule 91, pp. 386—388, *post*.

(*d*) See as to Jurisdiction, chaps. iv.—xviii., *post*.

(*e*) Compare *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358, especially judgment of Fry, L. J., pp. 407—409. For a similar theory of jurisdiction, though somewhat differently expressed, see 1 Bishop, Marriage and Divorce, ss. 14—24.

First. Any question about the competence of the Courts of a country is in reality, whatever the form may happen to be under which it calls for judicial decision, a question about the judicial competence of the sovereign of the country. When, for instance, the High Court decides that a Swedish Court is, whatever the authority given it by the King of Sweden, not a Court competent to divorce persons domiciled in England, the High Court in reality determines that the King of Sweden is not, in the opinion of the High Court, competent to divorce married persons who have an English domicile. So, again, where the High Court decides that it has itself, in general, no jurisdiction to divorce persons not domiciled in England, the High Court in reality determines that the English sovereign is not competent, that is, ought not, to divorce married persons nor domiciled in England.

There is of course this difference between the two cases. When the High Court is dealing with the jurisdiction, in matters of divorce, exercised by a Swedish tribunal, the Court may, and does, refuse to give effect to any divorce which, in the opinion of the High Court, the King of Sweden, and therefore the tribunal acting under his authority, was not competent to grant. When the High Court, on the other hand, is dealing with the jurisdiction in matters of divorce which the Court itself is called upon to exercise, it must obey the commands of the English sovereign. If, therefore, an Act of Parliament, or some established rule of English law, gives the High Court jurisdiction to divorce persons not domiciled in England, it must exercise the power and perform the duty imposed upon it, even though the Court may be of opinion that the English sovereign ought not to exercise jurisdiction, as regards divorce, over persons not domiciled in England (*f*). No Court, in short, can question the competence of the sovereign under whom it acts. This distinction, however, between the attitude of the High Court when dealing with the jurisdiction of foreign Courts and its attitude when dealing with its own jurisdiction is, for our present purpose, of subordinate importance. The High Court is, when dealing with questions of jurisdiction, little fettered by Acts of Parliament, and in the main (*g*) follows the general principles which commend themselves to our judges. All that need be noted is that every Court, and the High Court is no exception

(*f*) See *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1. Compare *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

(*g*) See, however, *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, cited above, p. 29.

to the rule, naturally tends to claim for itself a jurisdiction wider than it holds to be in principle properly exercisable by other tribunals. Hence the High Court's mode of dealing with foreign judgments is a better test of the doctrine maintained by it as to the proper limits of jurisdiction than are the rules by which it has defined the boundaries of the High Court's own authority (*h*).

Secondly. An "effective judgment" means a decree which the sovereign, under whose authority it is delivered, has in fact the power to enforce against the person bound by it, and which therefore his Courts can, if he chooses to give them the necessary means, enforce against such person; to look at the same thing from the other side, an effective judgment is a decree which gives to the person who obtains rights under it an actual and not a merely nominal right, that is, a right which, if aided by the sovereign whose Court has delivered the judgment, he can enforce. A judgment which is not "effective" or is "ineffective" means a decree which the sovereign under whose authority it is delivered has not in fact the power to enforce against the person bound by it, and which therefore the sovereign cannot, even if he choose, give his Court the means of enforcing; to look at the same thing from the other side, an ineffective judgment is one which gives to the person who obtains rights under it a merely nominal right, that is to say, a right which he cannot, even if aided by the sovereign under whose authority the judgment is delivered, actually and in fact exercise. Thus if the King of Italy, or, to use ordinary language, an Italian Court, gives a judgment entitling *A* to the possession of land at Rome which is occupied by *X*, the judgment is effective, since it can clearly, under the authority of the King of Italy, by means of Italian magistrates, policemen, or soldiers, be enforced against *X* in favour of *A*. If, on the other hand, an Italian Court should give a judgment entitling *A* to the possession of land in London occupied by *X*, the judgment is clearly ineffective, for it cannot by the mere power of the King of Italy, his policemen, or his soldiers, be enforced against *X* or in favour of *A*.

If these preliminary observations be borne in mind, the meaning of General Principle No. III. becomes clear. It may be called the "principle of effectiveness," or from another point of view the "test or criterion of effectiveness." However it be named,

(*h*) See Ord. XI., and App., Note 10, *post*.

it amounts simply to this: that the Courts of a country, as representing the sovereign thereof, have a right, in the opinion of English judges, to adjudicate upon any matter with which they have in fact the power to deal effectively, and have not a right to adjudicate upon any matter with which they have not in fact the power to deal effectively.

The "test of effectiveness" may be regarded as an application further of that general recognition of rights duly acquired under the law of any civilised country which is the true basis of all the rules of private international law (*i*). These rules exist to ensure the recognition everywhere of rights duly acquired under the law of any civilised country. But the actual acquisition of a right is a matter of fact. A nominal right which cannot be enforced is not in reality acquired. The principle, therefore, that the jurisdiction of a Court is to be recognised then, and then only, when the Court can give an effective judgment is in reality little more than the rule that English judges will treat as acquired under, *e.g.*, an Italian judgment, those rights, and those rights only, which the Courts or, at bottom, the sovereign of Italy can enforce.

SUB-RULE.—When with regard to any matter (*e.g.*, divorce) the Courts of no one country can give a completely effective judgment, but the Courts of several countries can give a more or less effective judgment, the Courts of that country where the most effective judgment can be given have a preferential jurisdiction.

This is a corollary to General Principle No. III. It has not often been distinctly formulated, but it accounts for more than one instance of what may seem an anomalous exercise of jurisdiction.

To understand the bearing of this corollary, let us contrast the effect of a judgment given by an English Court as regards the possession of land in England with a judgment by an English Court divorcing a husband and wife.

The judgment giving possession to *A* of land in London is as effective as the judgment of any Court, or the decree of any sovereign, can by possibility be made. *A* or his representative may, and will, be put into occupation of the land by the servants of the Court, and will not need for the enjoyment of his right as landowner the aid of any foreign tribunal. But if an English

(*i*) See General Principle No. I., p. 23, *ante*.

Court declares *A* divorced from *M*, the most that such judgment effects is that in England the parties have the rights of unmarried persons. The judgment cannot, of itself, secure that *A* or *M* shall be treated as unmarried in France or Italy, and conversely no sentence of divorce delivered in France can, of itself, secure that the divorced parties shall be treated as unmarried in England. Now the value of a sentence of divorce, given, *e.g.*, in England, depends upon the connection of the parties with England. If they belong to that country, if they habitually reside there, if it is their home or, in technical language, their domicile, then the English sentence of divorce is as effective as the sentence of the Courts of any one country can be. It gives *A* and *M* the status of unmarried people in the country to which they belong, that is to say, in the country where it is, both to them and to the country itself, of most importance that their status as married or unmarried persons should be fixed. If, on the other hand, *A* and *M* are domiciled, say, in New York, the English sentence of divorce is, comparatively speaking, ineffective. Hence the rule that the Courts of a person's domicile have at any rate jurisdiction, if not exclusive jurisdiction, in matters of divorce (*k*); and the same principle is, we shall find, applicable not only to all judgments affecting status, but also to jurisdiction in matters of succession to movable property (*l*).

GENERAL PRINCIPLE NO. IV. — The sovereign of a country, acting through the Courts thereof, has a right to exercise jurisdiction over any person who voluntarily submits to his jurisdiction (*m*), or, in other words, the Courts of a country are Courts of competent jurisdiction over any person who voluntarily submits to their jurisdiction.

This principle may be called the "principle of submission," or, from another point of view, the "test or criterion of submission." It applies to every kind of civil jurisdiction. It amounts to this, that a person who voluntarily agrees, either by act or word, to be bound by the judgment of a given Court or Courts has no right to deny the obligation of the judgment as against himself.

(*k*) See chaps. vii. and xv., *post*.

(*l*) See chap. xvi., *post*.

(*m*) See chap. iv., Rule 56, and chap. xiii., Rule 95, *post*.

To a certain extent Principle No. IV. may be treated as an application, or result, of Principle No. III. A person who agrees to be bound by the judgment of a Court, *e.g.*, by appearing as defendant, does often by this mere fact give the Court the means of making its judgment effective against him. Still, the principle of submission is, it must be admitted, often based upon grounds different from the principle of effectiveness. It is rather a portion, or development, of the rule that a person is bound by his contracts. Submission, it should be noticed, may take place in various ways, *e.g.*, by a party suing as plaintiff, by his voluntarily appearing as defendant, or by his having made it a part of an express or implied contract that he will, if certain questions arise, allow them to be referred for decision to the Courts of a given country (*n*).

Though General Principles Nos. III. and IV. are (it is submitted) sound, their truth cannot be dogmatically laid down. The doctrine they involve as to the criteria of jurisdiction underlies, it is contended, both the practice of our Courts and judgments or arguments which have met with general approval. But it cannot in the exact form in which it is here presented claim the direct sanction of English judges or of English text-writers. Hence arises the necessity for justifying this doctrine or theory. Its defence rests on a twofold process: first (*o*), the proof that the criteria or tests suggested apply, though not always with equal clearness, to the different kinds of jurisdiction which the High Court either itself exercises or concedes to foreign tribunals; and, secondly (*p*), the examination of the objections which apparently, at any rate, lie against the validity of the doctrine and of the General Principles in which it is expressed.

Let us then first examine the application of the principles or criteria of jurisdiction to different kinds of actions.

(1) *Actions in rem* (*q*).—In such actions jurisdiction admittedly depends primarily upon the *res*, *e.g.*, the ship, being within the control of the Court adjudicating upon the title thereto, or in

(*n*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17.

With the principle of submission, which applies more or less to all actions, we need concern ourselves but slightly. The main point to which attention should be directed is the extent to which the principle of effectiveness applies to different kinds of jurisdiction.

(*o*) See pp. 45 to 51, *post*.

(*p*) See pp. 51 to 59, *post*.

(*q*) See chaps. vi. and xiv., *post*.

strictness within the control of the sovereign under whose authority the Court acts (*r*).

In other words, the admitted rule as to judgments *in rem* is a direct and obvious application of the principle of effectiveness, and the same remark applies to jurisdiction in respect of immovables, or land, situate in a given territory (*s*). Whenever, indeed, a Court is applied to, as, for example, in the old action of ejectment, for the purpose of obtaining from it possession of land, or a determination of the right to the ownership of land, the proceeding is in substance, though it may not be in form, an action *in rem*.

(2) *Actions with regard to divorce and status (t)*.—Jurisdiction in regard to divorce in general depends, according to English law, upon the domicil of the married persons, one of whom seeks a dissolution of the marriage, *i.e.*, upon the domicil of the husband. The Courts of the domicil do possess, and the Courts of any other country, speaking generally, do not possess, jurisdiction to grant divorce.

No doubt there is a great deal which is artificial in the rules for determining a person's domicil (*u*). A man, and still more often a woman, may be legally held to have his or her home in a country where he or she does not live, and, it may be, never has lived. Hence there is an apparent unreality about the rule which bases a Court's authority to dissolve a marriage upon the domicil of the parties. Still, in the vast majority of cases, a person's domicil is his actual home; it is the country where he, in fact, lives. Hence, far more often than not, a divorce granted by a Court of a person's domicil is the most effective sentence of divorce which can be attainable. The practice, therefore, of the English Courts in this matter is a distinct application of the principle of effectiveness combined with the corollary thereto. To this we must add the consideration that, in questions concerning divorce and status generally, it is of practical importance that the Courts of some one country should have exclusive jurisdiction. We can therefore see why it is that, assuming the validity of the English doctrine of

(*r*) See Story, s. 592; and *Gastrique v. Imrie* (1870), L. R. 4 H. L. 414, 428, 429, language of Blackburn, J. Compare also chap. xiv., Rule 97, and comment thereon, *post*.

(*s*) See Story, ss. 589—591; and *Rose v. Himely*, 4 Cranch, 269, 270. See chap. iv., Rules 53, 57; chap. xii., Rule 93; and chap. xiv., *post*.

(*t*) See chaps. vii. and xv., *post*.

(*u*) See chap. ii., *post*.

a man's belonging to the country where he is domiciled, the Courts of the domicile at the time when the proceedings for divorce are taken not only have jurisdiction, but, subject to very limited exceptions, have, according to English law, exclusive jurisdiction in the matter. The same remark applies, speaking in broad terms, to all actions with regard to status. We can also see how it comes to pass that English Courts treat other circumstances, such, for example, as the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence giving rise to divorce is committed, as immaterial in respect of jurisdiction. These circumstances have nothing to do with the effectiveness of the sentence of divorce.

(3) *Actions with Reference to Succession (x)*.—The Courts of a deceased person's domicile are admittedly Courts of competent jurisdiction to determine the devolution, whether by will or otherwise, of the movable property left by the deceased. Here again we have a clear application of the principle of effectiveness.

A person belongs, according to the view of English judges, to the country where he is domiciled; it is there that he lives, it is there, in the main, that, speaking very generally, his movable property will be found situate. If it be desirable, as would be generally admitted, that the succession to the whole of his movable estate should be determined by some one law, then that law must be the law of the country to which he belongs, *i.e.*, where he dies domiciled. Hence the Courts of a deceased's domicile should certainly be held Courts of competent jurisdiction in regard to succession to movables. Whether they ought to be held to be Courts of exclusive jurisdiction is a somewhat different matter, with which it will be convenient to deal in considering the objections to the doctrine that jurisdiction is based in the main on our two principles (*y*).

(4) *Actions in Personam (z)*.—This is the class of actions which presents most difficulty to a student bent on ascertaining the theory of jurisdiction upheld by the High Court. One reason of this is that the Court almost admittedly claims for itself a jurisdiction more extensive than it would concede to foreign tribunals (*a*). Another reason is that the judges of the High

(x) See chaps. ix. and xvi., *post*.

(y) See pp. 52—55, *post*.

(z) See chaps. v. and xiii., *post*.

(a) See *Schibsby v. Westernholz* (1870), L. R. 6 Q. B. 155, 159.

Court can hardly be said to have propounded any one guiding principle as to jurisdiction *in personam*, or rather, as we shall show later, the single principle which has been judicially put forward, with more or less authority (*b*), derives its real meaning from the instances and illustrations of it. For guidance as to the jurisdiction claimed by the Court itself we must look partly to the practice (independently of Acts of Parliament) of the old Courts of Common Law and of Equity, partly to a list of the instances in which the jurisdiction of the High Court has received statutable extension (*c*). For guidance as to the jurisdiction conceded to foreign tribunals by the High Court we must look to the, more or less, authoritative enumeration of the cases wherein the judgment of a foreign Court is to be held *primâ facie* binding, as being delivered by a Court of competent jurisdiction (*d*). This list, however, does not profess to be exhaustive, nor, except in so far as it may be confirmed by reported decisions, is it of undisputed authority. Our right course is to take the instances in which the High Court apparently exercises, or concedes, jurisdiction, and show that many of them hold good in principle when tested by our criteria.

The High Court exercises jurisdiction *in personam* both where the defendant is, and often where the defendant is not, in England at the time of the commencement of an action.

First,—where the Defendant is in England. The High Court, or rather the Courts of Common Law and of Equity, which for our present purpose make it up, have always claimed jurisdiction *in personam* over a defendant in virtue of the service upon him of the king's writ, and as the writ can be served upon any one in England, and cannot, except under statute, be served upon any one out of England, this has been in effect a claim to jurisdiction based on the presence of a defendant in England. But such jurisdiction, though originating in technical rules of practice, is in reality based upon the principle of effectiveness. Whenever the King of England could serve a defendant in England with the royal writ, or command, the king could, if he chose, make his judgment effective against the defendant (*e*).

(*b*) *Ibid.*

(*c*) Ord. XI. r. 1, and see App., Note 10, *post*.

(*d*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

(*e*) See, as to process, 3 Blackstone, cap. xix. pp. 279—292, and note particularly, as to the different modes of compelling appearance, "First Report of

Secondly,—where the Defendant is not in England. The Courts of Common Law and of Equity have never till recent times claimed or exercised, at any rate directly, jurisdiction over a defendant who was not in England at the time for the service of the writ. The test, therefore, of effectiveness has till recently at any rate held good in its negative, no less than in its positive, aspect.

The Courts of Common Law and of Equity have further always exercised jurisdiction over a defendant who appeared to, or a plaintiff who brought, an action or suit. This again is in strict conformity with the principle or test of submission.

But the High Court now, under statutable powers (*f*), exercises jurisdiction in several cases in which the defendant is not in England, and cannot therefore be served with a writ in England. In dealing with this matter we may dismiss from consideration all actions which directly or indirectly concern land in England (*g*); they are in reality, though not in form, actions *in rem*, and the jurisdiction of the Court clearly stands the criterion of effectiveness. Two of the other instances in which the jurisdiction of the Court is exercised are: where relief is sought against a person *domiciled*, or *ordinarily resident*, in England (*h*); and next, wherever any injunction is sought as to anything to be done in England, or any nuisance in England is sought to be prevented or removed (*i*).

Here again there is no substantial difficulty in applying the principle of effectiveness. The first of these instances is little more than an extension of the rule that a defendant who is present in England is liable to the jurisdiction of the Court. A person who is domiciled, or is ordinarily resident, in a country is a person against whom a judgment can, if not always yet more often than not, be rendered effective. Something indeed may be said against the admission of domicile as a ground of jurisdiction *in personam*, and this point will be considered in due course (*k*). The second of these instances clearly stands the criterion of effectiveness. When an injunction is applied for against something done or to be done in England, the Court is clearly asked to exercise

Commissioners for Inquiring into the Process, &c. of Pleading in the Supreme Courts of Common Law, 1851," pp. 4—7.

(*f*) See Ord. XI. r. 1.

(*g*) *Ibid.*, r. 1 (a), (b).

(*i*) *Ibid.*, r. 1 (f).

(*h*) *Ibid.*, r. 1 (c).

(*k*) See p. 52, *post*.

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precisely the powers which English Courts, and no others, can effectively exert.

No doubt the High Court does exercise jurisdiction in cases which do not, obviously at least, come within either the principle of effectiveness or the principle of submission, and the existence of these cases (*l*) is an objection to the soundness of the doctrine propounded in this Introduction. The force of this objection will receive consideration in its proper place. Meanwhile all that need here be insisted upon is that the jurisdiction *in personam* of the High Court, in so far as it is original and independent of statute, rests almost entirely upon one or other of our two principles of jurisdiction, and, in so far as it is statutable, is to a very great extent based on the principle of effectiveness.

The High Court certainly, or all but certainly, concedes jurisdiction to the Courts of a foreign country in the following cases (*m*):—

- (i) Where the defendant is at the time of the action being brought resident [present?] in the foreign country.
- (ii) Where the defendant is at the time of the judgment being delivered a subject of the sovereign of the foreign country.
- (iii) Where the party who objects to the jurisdiction has by his conduct precluded himself from objecting to the jurisdiction of the foreign Court (*n*).

These are the sole instances in which it is in any degree certain that our judges concede jurisdiction *in personam* to the Courts of a foreign country, and much doubt may now be entertained whether jurisdiction would always be conceded solely on account of the defendant's allegiance (*o*).

Now, of these instances, cases i. and ii. clearly come within the

(*l*) Ord. XI. r. 1 (e), (ee), (g); and compare Ord. XVI. r. 48.

(*m*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351. See chap. xiii., *post*.

(*n*) See chap. xiii., *post*.

(*o*) *Douglas v. Forrest* (1828), 4 Bing. 686, is the only case known to us which comes near to a decision that allegiance is a basis of jurisdiction. There are, of course, *dicta* in *Schibsby v. Westenholz*, *Rousillon v. Rousillon*, and elsewhere, to the effect that the Courts of a country have jurisdiction over a defendant who at the time when the judgment is given is a subject of the sovereign thereof. Compare, however, *Gibson & Co. v. Gibson*, [1913] 3 K. B. 379, which shows that the principle is not applicable as between the different parts of the British dominions, allegiance being but one and indivisible. *In re Johnson*, [1903] 1 Ch. 821, 832—835.

principle of effectiveness, whilst case iii. is nothing but the application, or rather the expression, of the principle of submission.

Let us next consider the objections which may fairly be brought against the validity of the proposed criteria of jurisdiction. Our theory of jurisdiction is open to objections of two different kinds.

First objection.—English judges, it may be urged, have maintained a different doctrine, for they have based the jurisdiction of a sovereign, when acting as judge, not on his power to enforce his judgments, but on the “duty” of the person affected thereby (speaking generally the defendant) to obey them.

That the judges have used language which apparently supports this objection is true. “We think,” say the Court of Queen’s Bench, “that the judgment of a Court of competent jurisdiction “over the defendant imposes a duty or obligation on the defendant “to pay the sum for which judgment is given, which the Courts “in this country are bound to enforce; and consequently that “anything which negatives that duty, or forms a legal excuse for “not performing it, is a defence to the action” (*p*).

The answer to this objection is that the doctrine judicially laid down does not in any way contradict the principle here contended for. The language of Baron Parke, adopted by the Court of Queen’s Bench in the passage just cited, is, when taken alone, too vague to afford a test of jurisdiction. The term “duty” cannot be used in its ethical sense. The moral obligation of a defendant, *X*, to obey the judgment of an Italian Court, ordering him to pay 20*l.* to *A*, depends on many considerations which Courts of law, not being Courts of casuistry, do not attempt to touch, and above all, on the very matter which, in an action on a judgment, cannot be discussed at all, namely, whether *X* does or does not, in fact, owe 20*l.* to *A*. A “duty” from a legal point of view is the correlative to a “right,” and the question, therefore, whether *X* is under a legal duty to obey the judgment of the Italian Court is identical with the inquiry whether the King of Italy, acting through his Courts, has a right to command *X* to pay *A* 20*l.*? That this is so is admitted by the very judgment which treats the “duty” of the defendant as a criterion by which to determine the competence of a foreign Court (*q*). We are forced,

(*p*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 159, *per Curiam*. See *Russell v. Smyth* (1842), 9 M. & W. 819; *Williams v. Jones* (1845), 13 M. & W. 628, 633.

(*q*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 160, 161.

then, to ask, when has a given sovereign, *e.g.*, the King of Italy, the "right" to issue commands to X? This is the problem to be solved. Our criteria are an attempt to solve it. The validity of a solution cannot be affected, one way or the other, by stating the problem which the solution is intended to answer. The Court of Queen's Bench does not in fact really rely upon the vague principle that the validity of a foreign judgment depends on the duty of a defendant to obey it. What the judges really do is to enumerate the circumstances under which this duty arises, and to show that, in the particular case, none of the conditions, which create a duty on the part of a defendant to obey, or the right on the part of a sovereign to issue, a judgment against him, exist. The important thing, therefore, to ascertain is whether the principle of effectiveness and the principle of submission do, or do not, include all the conditions under which, according to the judgment of the Court of Queen's Bench, a person is bound, or is under a duty to obey, the commands of a sovereign.

Here we come across another and much more serious objection to the positions which we are concerned to defend.

Second objection.—The High Court, it may be urged, claims or concedes jurisdiction under circumstances which cannot be covered by either of our principles of jurisdiction.

The validity of this criticism can be determined only by examining the cases of the exercise of jurisdiction which, apparently at least, fall within neither the principle of effectiveness nor the principle of submission.

These anomalous or exceptional cases may be brought under the following heads, to some of which reference has already been made in the foregoing pages.

(1) *Jurisdiction founded upon domicil or ordinary residence (r)*.—That a person should be bound by a judgment because he is domiciled in the country where the Court delivering judgment has authority is, it must be admitted, to a certain degree an anomaly.

In actions having reference to status this anomaly may, as already suggested, be without great difficulty accounted for. The Courts of a man's domicil can give a *more effective* judgment with regard to his status, *e.g.*, on the question whether he is to be held legitimate or not, than the Courts of any other country. That jurisdiction should, therefore, in this case depend upon domicil, is in conformity with the principle of effectiveness and the corollary thereto.

(r) See chap. v., Rule 60, Exception 3, p. 258, *post*.

That domicile should be the test of jurisdiction in matters of succession to movable property admits also of explanation. It is true that, if each piece of property be looked at separately, jurisdiction ought to belong, not to the Courts of the deceased's domicile, but to the Courts of the country where each piece of property is situate at the time of his death, for it is clear that it is the Courts of the *situs* which can give the most effective judgment with regard to the possession of property situate within a given territory. But if it be convenient, as it certainly is, that the Courts and the law of some one country should determine the succession to the whole of a deceased's movable property, then it is in accordance with the principle of effectiveness that jurisdiction should belong to the Courts of the deceased's domicile.

From the fact, however, that in matters of succession the power of giving an effective judgment belongs rather to the Courts of the *situs* than to the Courts of the domicile, flow some noteworthy results.

In the first place succession to land is determined by the Courts of the country where the land is situate (*s*).

In the second place, in countries such as England, where a distinct difference is drawn between the administration of and the beneficial succession to movables, every matter connected with administration is within the jurisdiction of the Courts of the country where any articles of a deceased's movable property are locally situate (*t*). *T*, an intestate, for example, dies domiciled in Portugal, leaving goods, money, &c., in England. The Portuguese Courts indeed are Courts of competent jurisdiction to determine whether *A*, *T*'s natural son, is or is not entitled to succeed to such part of *T*'s money and goods as may remain after the due administration of *T*'s property in England, *e.g.*, the payment of his debts there, and the decision of the Portuguese Courts in the matter of *A*'s claim to succeed will be taken as conclusive by English Courts (*u*). But it is to the English Courts, or to persons acting under their authority, that belongs the right and duty of administration. They are in this matter the Courts of competent (*x*) and exclusive jurisdiction.

In the third place, though, as regards beneficial succession

(*s*) Story, s. 591; Rules 53, 57, 93, 97, *post*.

(*t*) See chap. ix., Rule 76, *post*.

(*u*) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

(*x*) Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1, with *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; (1885), 10 App. Cas. 453.

to movables, the Courts of the deceased's domicile are Courts of *competent* jurisdiction, they are not Courts of *exclusively competent* jurisdiction. Thus, though to follow out our supposed case of a Portuguese dying domiciled in Portugal, and leaving movables in England, the Portuguese Courts are competent to determine whether *A* has a right to succeed beneficially to *T*, yet the right and duty of the English Court in "administering the property, "supposing a suit to be instituted for its administration, is to "ascertain who, by the law of the domicile, are entitled [to succeed "to *T*'s property], and, that being ascertained, to distribute the "property accordingly. The duty of administration is to be discharged by the Courts of this country, though in the performance "of that duty they will be guided by the law of the domicile" (*y*), and will follow any decision given in the matter, *e.g.*, as to the right of an illegitimate son to succeed, by the Courts of the domicile (*z*). The admitted rules, in short, as to jurisdiction in matters of succession, arise not from any opposition to the principle of effectiveness, but from a question how best to apply it to the matter in hand. Look at the property of a deceased as a whole, and the Courts of the country to which he belongs (*i.e.*, according to English law, of his domicile) will appear to be in general the tribunals most capable of giving an effective judgment with regard to it. Look, however, at his movable property, not as a whole, but as consisting of separate movables, and then it will appear that the Courts of a country where each movable is situate are the tribunals capable of giving the most effective judgment with regard to such movable. Whatever be the most proper application of the principle of effectiveness, the very difficulties felt by the Courts in applying it show that it is the principle by which they are guided in matters of succession.

Why, however, should domicile be a foundation of jurisdiction in personal actions?

The answer apparently is that, until recently, it never has been, according to English law, a ground for jurisdiction. That it has recently been treated as such must be attributed, either to the habit of resting jurisdiction on domicile in matters of status and of succession, or to the fact that, when a man is "domiciled" or "ordinarily resident" in a country, the Courts of that country

(*y*) *Enohin v. Wylie* (1862), 10 H. L. C. 13, per Lord Cranworth; cited with approval in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 503, per Lord Selborne.

(*z*) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

can, if not always, yet frequently, make a judgment against him effective, with which fact is combined the consideration that a man who has his domicile or ordinary residence, *e.g.*, in England, may perhaps be taken to submit to the jurisdiction of the English Courts. However this may be, the admission ought to be made that, as regards actions *in personam*, it is something of an anomaly that domicile should be made a ground of jurisdiction.

(2) *Jurisdiction founded on place of obligation* (a).—It is sometimes asserted that the High Court recognises the jurisdiction of the *forum obligationis*, that is, of the Courts of the country where an obligation is incurred, or, in the terms of English law, a cause of action has arisen (b). For this assertion, however, if made in its full breadth, no decisive authority can be cited. Neither at Common Law nor in Equity did the *mere fact* of a tort having been committed, or of a contract having been made or broken, in England, give the Courts jurisdiction over a defendant not present in England, and there is no reason to suppose that the English Courts have ever conceded to foreign tribunals authority more extensive than that which the English Courts claimed for themselves. At the present moment, moreover, not only is there nothing to show that the commission of a tort (c) in a foreign country, is held by our judges to give jurisdiction in respect of the wrong to the Courts of the country where the wrong is committed; but there is some, though not decisive, authority for the assertion that they do not recognise such a ground of jurisdiction (d).

The Common Law Procedure Act, 1852, ss. 18, 19, indeed gave the Common Law Courts jurisdiction (which the judges themselves thought in principle hardly defensible) (e) over a defendant not present in England, when either the cause of action arose in England or depended upon the breach of a contract made in England (f), and the High Court now claims jurisdiction *in per-*

(a) See chap. v., Rule 60, Exceptions 5 and 6; and compare chap. xiii., Rules 95, 96, *post*.

(b) See *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; compared with Westlake (5th ed.), s. 322, and Ord. XI. r. 1 (e).

(c) See *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358, 413, judgment of Fry, L. J. Since 1920 the commission of a tort in England has been a ground for the exercise of jurisdiction over a person not present in England; see Rule 60, Exception 6, p. 265, *post*.

(d) *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670. Compare chap. xiii., Rule 96, *post*.

(e) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

(f) C. L. P. Act, 1852, s. 18. And see *Jackson v. Spittall* (1870), L. R. 5

sonam over an absent defendant when the action is founded on a contract which is made in England, or which by its terms or by implication is to be governed by English law, or on a breach committed in England of part of a contract, wherever made, which ought to have been performed in England (*g*). Whether the High Court would concede an analogous jurisdiction to foreign tribunals is a point on which no certain opinion can be pronounced, whilst authority can be (*h*) cited for the proposition that the mere circumstance of a contract having been made in a foreign country does not give jurisdiction to the Courts thereof.

Even this amount of respect for the *forum obligationis* cannot, it will be said, be explained by the principle of effectiveness. This is true; but the jurisdiction of the Courts of a country where a contract is intended to be performed, and is in fact broken, admits of explanation as an extension of the principle of submission. If *X* contracts with *A* to do something, *e.g.*, build a house or deliver goods in France, there is, at any rate, some ground for the assumption that *X* and *A* tacitly agree to submit any controversy as to the performance of the contract by *X* to the decision of the French Courts. If this explanation be thought far-fetched, then the deference in this case paid to the *forum obligationis* must be treated as an anomaly, suggested to English judges when framing rules as to jurisdiction (*i*) by the provisions of the Common Law Procedure Act, 1852, ss. 18, 19. Still more anomalous is the exercise of jurisdiction by English Courts merely because a contract has been made in England, and in deference to Scottish protests the exercise of jurisdiction was in 1921 abandoned in cases of persons domiciled or ordinarily resident in Scotland.

(3) *Jurisdiction founded on possession of property (k)*.—Ought the possession of immovable or movable property in a particular country to give the Courts thereof jurisdiction over the possessor?

C. P. 542; *Durham v. Spence* (1870), L. R. 6 Ex. 46; *Allhusen v. Malgarejo* (1868), L. R. 3 Q. B. 340.

(*g*) Ord. XI. r. 1 (*e*), as amended in 1920 (R. S. C., July 14) and 1921 (R. S. C., June 23).

(*h*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351. Compare, especially, *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; and see chap. xiii., Rule 96, *post*.

(*i*) Ord. XI. r. 1.

(*k*) Compare chap. v., Rule 60, Exceptions 4 and 9, and chap. xiii., Rule 96, *post*.

This is a question which, in the opinion of English judges, is still open to discussion.

Two points, however, must be carefully distinguished.

The possession of property, whether land or goods, undoubtedly gives the Courts of the country where the property is situate jurisdiction over that property, and, therefore, over the owner or possessor thereof, in regard thereto. If a man claims land or goods in Italy, the Italian Courts have a right to determine who is the person entitled to the ownership, or possession, of such land or goods. Such a determination is in substance, though not necessarily in form, a judgment *in rem*, and its effect is, subject to exceptions, with which we need not now trouble ourselves, fully recognised by English Courts (*l*). One may perhaps go further and say that the possession of property, at any rate of land, in a country gives the Courts jurisdiction over the possessor in regard to obligations connected with this property (*m*). This concession of jurisdiction is not only consistent with, but confirmatory of, both the principle of effectiveness and the principle of submission.

The possession of property, whether land or movables, is, however, in Scotland, as in some other countries, held to give the Courts of the country jurisdiction over the possessor, not only in respect of the property or of duties connected therewith, but generally, and in short, to have the same effect as is given to the presence of the owner in Scotland. This is apparently the theory of (so-called) arrestment to found jurisdiction (*n*); if, for example, X has broken a contract with A, or done a wrong to A, and goods of X's are lying in Scotland, the arrest of the goods gives the Scottish Courts, according to Scottish law, jurisdiction to entertain an action against X for the breach of contract or the wrong (*o*). The High Court, however, does not claim jurisdiction for itself on account of the presence in England of a defendant's property, and English judges have expressed the greatest doubt whether the possession of property locally situate in a country and pro-

(*l*) See *Castrigue v. Imrie* (1870), 39 L. J. C. P. 350; *Schibbsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 163; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

(*m*) *Ibid.*, and *Becquet v. McCarthy* (1831), 2 B. & Ad. 951; and compare Ord. XI. r. 1 (a), (b).

(*n*) Duncan & Dykes, *Principles of Civil Jurisdiction*, pp. 58—103; Maclaren, *Court of Session Practice*, pp. 40—53.

(*o*) See especially, *Ibid.*, pp. 74, 75.

tected by its laws does afford a ground of jurisdiction, and clearly incline to the opinion that it does not.

Now the noticeable thing is the existence of this doubt and the reason thereof. The argument for basing jurisdiction on the possession of property is that the possession by *X* of property, *e.g.*, in Scotland, especially when seized by the Scottish Courts, does, as far as it goes, give the Courts the means of rendering a judgment against *X* effective. The argument against making the possession of property a ground of jurisdiction is that "the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment" (*p*) given against him by the foreign Court in an action, *e.g.*, for libel, which has no reference to his rights over such property. In other words, the objection to jurisdiction founded on the possession of property, say in Scotland, is that the fact of *X*'s possessing property in Scotland does not of itself give the Scottish Courts power to deliver an effective judgment against *X*. Whatever be the weight of the arguments in favour of, and against, the founding of jurisdiction on the possession of property, the hesitation of English judges in the matter is instructive. They hesitate because there is a difficulty in determining how far jurisdiction resting on the possession of property stands the test of effectiveness (*q*).

(4) *Jurisdiction founded on considerations of convenience.*—The High Court assumes jurisdiction in certain instances on the ground of convenience, and especially upon the ground of the advantage of pronouncing judgment once for all against every person interested in a particular action. Thus a person, *Y*, living out of England, may be joined as defendant in an action against *X*, because he is a proper party to the action (*r*), and on similar grounds a defendant may join in the action a third party (*s*), against whom he is entitled to indemnity even though such third party be out of England. The exercise of jurisdiction in these instances cannot fairly be brought under the principle either of effectiveness or of submission; it is, strictly speaking, anomalous and justifiable, if at all, only by considerations of immediate con-

(*p*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 163.

(*q*) Compare the Report of the Committee on British and Foreign Legal Procedure, 1919, Parliamentary Paper, Cmd. 251, pp. 3, 4.

(*r*) Compare chap. v., Rule 60, Exception 8, *post*, based on Ord. XI. r. 1 (*g*).

(*s*) See Ord. XVI. r. 48.

venience. Our Courts would scarcely admit the validity of foreign judgments against persons made parties to an action under rules similar to Rules of Court, Ord. XI. r. 1 (g), or Ord. XVI. r. 48.

Our examination, then, of the principles, or criteria, of jurisdiction leads to this result. The greater number of the instances in which the High Court itself claims jurisdiction, or allows jurisdiction to foreign Courts, fall under one or other of our two principles. The instances which do not at first sight fall under one of these principles are some of them seen to be in reality applications of one or other of these principles, modified more or less by the desirability (*e.g.*, in the case of divorce) of enabling the Court of some one country to give a final decision on matters as to which the Court of no country can give an absolutely effective judgment. In other instances the rule as to jurisdiction is doubtful, but in these the doubt is found, on investigation, to arise not from the invalidity of our tests, but from a difference of opinion on the result to which the application of these tests leads. There are, further, one or two cases in which our Courts, for purposes of convenience, exercise a jurisdiction which they would not concede to foreign tribunals. If, however, the instances in which our tests obviously hold good be fairly compared with the few instances in which their validity is disputable, the conclusion to which we are led is that the principle of effectiveness and the principle of submission are the true, though not perhaps the sole, criteria of jurisdiction.

Choice of Law (t).

GENERAL PRINCIPLE No. V.—The nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired (*u*).

This principle is an immediate inference from Principle No. I. If *A* acquires, under the law of France, a right to be paid 20*l.* by *X*, it follows that, if *A* is to enforce his right, we must inquire exactly what the right is which the law of France gives him, for

(*t*) See as to choice of law, chaps. xix. to xxxii., *post*.

(*u*) See *Hooper v. Gumm* (1867), L. R. 2 Ch. 282, 289, judgment of Turner, L. J. Compare *Anderson v. Laneville* (1854), 9 Moore, P. C. 325, and *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Embiricos v. Anglo-Austrian Bank*, [1904] 2 K. B. 870; [1905] 1 K. B. (C. A.) 677.

if this is not done, and the case is determined exactly as if the debt had been incurred in England, then it is possible that *X* may receive something more or less than he can fairly claim, or, in other words, that English Courts may enforce, not the right acquired under the law of France, but some different right. But to do this is to violate General Principle No. I. We may see more clearly that this is so, if we suppose the French Courts to be called upon to enforce a right acquired by *A* against *X* under the law of England. The reason why they enforce *A*'s claim at all is the advisability of giving effect in France to rights acquired by one Englishman against another in England. But, if English law be not regarded as to the nature of the right acquired, we can see in a moment that error and injustice would be the result. Thus, *X* and *A* are Englishmen, living in England. *X*, out of gratitude to *A*, but for no consideration whatever, promises *A* to pay him 100*l.* The promise gives *A* no legal right whatever, under English law, to the payment of the 100*l.* by *X*. Both parties being in France, *A* sues *X* in a French Court for the 100*l.* as a debt owing to him. If *A*'s claim be measured, as it ought to be, by English law, then *A* will recover nothing; having acquired no right to payment under English law, he possesses no right which he can enforce in France. If, on the other hand, the nature of *A*'s claim be not measured by English law, then he may very possibly recover 100*l.*; with the result that he enforces not a right duly acquired under English law, but a non-existent right which the French Courts erroneously thought he had acquired under English law. The French Courts, in other words, through neglect of Principle No. V., fail in their effort to enforce in France a right acquired under the law of England (*x*).

GENERAL PRINCIPLE No. VI. — Whenever the legal effect of any transaction depends upon the intention of the party or parties thereto, as to the law by which it was governed, then the effect of the transaction must be determined in accordance with the law contemplated by such party or parties (*y*).

(*x*) Compare, as to possible mistake as to the law of England, *Castrique v. Imrie* (1870), L. R. 4 H. L. 414. It seems to follow that where a promise, governed by the law, *e.g.*, of Scotland, is under Scottish law valid, without a consideration, an action may be maintained upon it in England: *In re Bonacina*, [1912] 2 Ch. (C. A.) 394.

(*y*) As to contracts, see *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Greer v.*

This is a canon having reference, not to the *acquisition* but to the *interpretation* of rights; it defines a second ground on which English Courts have to consider the effect of foreign law. In the cases which come within it regard is paid to foreign law, not because such law confers any rights upon a given person, but because the terms of the law explain what are the rights which given persons intended to give or acquire in consequence of a particular transaction.

In many instances the legal effect of a person's conduct is independent of his will or intention. In others, and notably in the case of wills or contracts (z), the aim of the Courts is to carry out the intention or wish of some given person or persons, and if the Courts are called upon to construe a testamentary document or agreement, they must look to the intention of the testator or of the contractors. But such intention cannot in most cases be ascertained without considering what was the law with reference to which the testator made his will, or the contractors entered into an agreement. The person whose intention has to be ascertained—we will suppose him, for the sake of simplicity, to be a testator—may point out in so many words what is the body of rules, or the law in reference to which his will is to be construed. An Englishman domiciled in England may say expressly that he wishes his property to be distributed, in so far as English law does not forbid such distribution, in accordance with the principles laid down by Bentham in his *Principles of a Civil Code*, chapter iii., or in accordance with the provisions of the *Code Napoléon*. In the one case it would be necessary to examine the writings of the jurist, in the other it would be necessary to examine the French Code, in order to determine what were the intentions of the testator. The rights of the persons benefited by the will would depend, in the one instance, on the doctrines of Bentham, and in the other on the provisions of the *Code Napoléon*. It is of course perfectly plain that neither Bentham's writings nor the Code would be the *source* of the rights acquired by the will; the source would be the law of England giving effect to the intention of the testator. Bentham's works, or French law, would be consulted only with a view to ascertaining what were the testator's intentions. Foreign

Poole (1880), 5 Q. B. D. 272; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321. As to marriage settlements, see *Este v. Smyth* (1854), 18 Beav. 112, 121, 122, judgment of Romilly, M.R. As to wills, see *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617, 625; *Studd v. Cook* (1883), 8 App. Cas. 577; *In re Miller*, [1914] 1 Ch. 511.

(z) See, especially, chap. xxv., Rules 155, 161, and Sub-Rules thereto, *post*.

law, to confine our attention to the Code Napoléon, would be not the source of a right, but simply a necessary means of interpreting a right. So if A and X enter into a contract to be carried out in France, and expressly provide that its terms shall be construed in accordance with French law. An English judge, called upon to decide whether the agreement has or has not been broken, must of necessity consider the nature of the French law of contract (a).

These remarks apply equally to the far more frequent cases in which, through a document contains no explicit incorporation of foreign law, the inference may fairly be drawn, either from the terms used or from the nature of the transaction, that it was written or executed with reference to the law of some foreign country. Suppose, for example, that a Frenchman, domiciled in England, makes a will in which the terms of French law are employed, it becomes necessary to consider, in construing the will, whether we must not incorporate into it the law of France, and a similar question occurs wherever a contract is entered into which, though containing no reference to French law, is to be wholly or partially performed in France. "The general principle, in short, "by which the Court [is guided] in the solution of the question as "to what law ought to prevail [is] that the rights of the parties "to a contract are to be judged of by that law by which they "intended, or rather by which they may justly be presumed to "have intended, to bind themselves" (b), and all the special rules of interpretation enjoining that a contract must be construed in some instances according to the law of the domicile of the parties, in others according to the law of the flag, in others according to the law of the place of performance, or in others according to the law of the place where the contract is made, are, in so far as they hold good, simply applications to special circumstances of the principle that you must look to the intention of the parties. By "intention," however, we must always remember is meant, not the expressed, or even the consciously entertained, intention of the particular persons, but the intention which, in the opinion of the Court, most persons in the position of the particular parties would have entertained had their minds been called to the matter at the moment of entering into a contract or other legal transaction.

What for our present purpose deserves particular attention is,

(a) See, for an illustration of the incorporation of foreign law in a contract, *Dobell v. Steamship Rossmore Co.*, [1895] 2 Q. B. (C. A.) 408; *Ex parte Dever* (1887), 18 Q. B. D. (C. A.) 660.

(b) See *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 326, 327, per Chitty, J.; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122.

that reference to foreign law under Principles No. V. and No. VI. is due to different causes. Under Principle No. V. our Courts look to foreign law as the *source* of an alleged right; under Principle No. VI. they look to foreign law as an *interpretation* of an alleged right. If, for example, *A*, a French citizen, sells and delivers goods at Paris to *X*, another French citizen, and sues *X* for payment in England, *A*'s right to payment by *X*, if it exist, originates in, and depends upon, French law. It is in reality a "French right," if the expression may be used, which *A* attempts to enforce in England, and to such an attempt any provision of French law which extinguishes *A*'s right is an answer (*c*). If, on the other hand, *A* and *X*, two Englishmen domiciled in England, make a contract, or *T*, an Englishman domiciled in England, executes a will, the terms whereof to a certain extent embody the law of France, the rights of the parties under the contract or of the beneficiaries under the will arise from the law of England, though they cannot be interpreted without reference to the law of France; just as, to recur to an example already used, the will of an Englishman domiciled in England, under which the testator's property is to be distributed in accordance with the views of Jeremy Bentham, needs for its interpretation a reference to Bentham's works, though it is clear that the rights of the beneficiaries under the will depend, not upon any authority possessed by Bentham, but upon the law of England.

The distinction between the two different grounds for the application of foreign law to the determination of a given case has been sometimes overlooked; nor is it always very easy to see on which of the two grounds it is that foreign law is really applicable. The determination, however, of what may seem a fine point may be of considerable importance (*d*).

It should, however, be observed that General Principle No. VI., no less than General Principle No. V., is nothing but an application of the fundamental canon of private international law embodied in General Principle No. I.; they are both of them maxims for ascertaining what is the legal right in fact acquired by a given person, *A*, which therefore our Courts may under Principle No. I. rightly enforce. If his right is acquired under the law

(*c*) See *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525. Note that a mere extinction of *A*'s remedy, *e.g.*, by a law of limitation, is not the same thing as the extinction of *A*'s right. See Comment on Rule 203, chap. xxxii., *post*.

(*d*) Compare *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321; *Hamlyn v. Talisker Distillery*, [1894] A. C. 204.

of France, you must determine its existence and nature by French law, *i.e.*, you must apply General Principle No. V.; if his right again, though acquired under the law of England, is to be interpreted by reference to the law of France, you must explain and define it by reference to French law, *i.e.*, you must apply General Principle No. VI.

What, it may be asked, is the true nature and the real value of the General Principles propounded in this Introduction?

They are not axioms whence may at once be logically deduced the Rules to be found in the body of this treatise.

They are not again propositions covering the whole field of private international law and possessing such accuracy and precision as to be applicable with confidence to the solution of the novel questions, which from day to day arise as to the extra-territorial recognition of rights. With regard, indeed, to some departments of law (such, for example, as the law of contract) which have been fully worked out, and the fundamental conceptions whereof have been finally determined in England by many years of judicial legislation, it may be possible to lay down leading propositions which cover the whole subject. With regard to the rules of private international law recognised by English Courts this is impossible. These rules are of recent growth. They are subject to constant change and expansion. Whilst many single maxims may be treated as well established, many of the fundamental ideas on which the system rests are far from being well defined or beyond dispute, and rules, it must be added, which are repeated in text-books, and even in judgments, will often be found on examination to rest on a very narrow basis of precedent; whilst the actual practice of the Courts in some instances hardly coincides with doctrines nominally laid down in judgments of received authority.

But though the foregoing General Principles are neither axioms, nor precisely stated propositions which cover the whole field of private international law, they possess a distinct character and value of their own.

They are essentially generalisations suggested by the decisions of the Courts taken in combination with judicial dicta, and with the doctrines in regard to the conflict of laws propounded by writers, such as Story, Westlake, or Savigny, of acknowledged weight and authority. These generalisations, though not laid down, in so many words, by English judges, do, it is submitted, express the grounds on which reported decisions may logically be

made to rest; they are far less the premises from which our judges start, when called upon to determine any question of private international law, than the principles towards the establishment of which the decisions of our Courts gradually tend. They mark not so much the *terminus a quo* as the *terminus ad quem* of judicial legislation. The doctrine, for example, which is embodied in General Principle No. I., of the extra-territorial recognition of duly acquired rights, is rarely, if ever, enunciated in its full breadth by an English Court. But hardly a month passes without some judgment being delivered in some Division of the High Court which exhibits the increasing influence in England of the tendency, prevalent throughout the civilised world, to give full effect to rights acquired under (*e*), or in some way measured by (*f*), foreign law. The principle again, that the jurisdiction of a country's Courts is, or ought to be, governed by the criterion of effectiveness (*g*), may be nowhere authoritatively laid down as a maxim recognised by the law of England. But our Courts do to a very great extent regulate the exercise of their own jurisdiction, and still more often determine what recognition is to be given to foreign judgments by reference to the test of effectiveness. Even the anomalous instances in which this criterion or principle is disregarded cannot be understood unless the principle itself is recognised; for the true bearing of an exception is never fully perceived without a knowledge of the rule from which it is a deviation.

When the nature of these General Principles is appreciated, their true value becomes apparent. They open to students a general view of the whole subject of private international law as administered by English Courts. They indicate the direction in which the rules as to the extra-territorial recognition of rights tend, and thus give a rational meaning to maxims which, when taken by themselves, appear arbitrary or conventional; and, if they do not directly solve new problems of private international law, help us in perceiving what are the problems which need solution. These General Principles, in short, in so far as they are correct generalisations obtained from and confirmed by decided cases, place a reader in the right position for appreciating the meaning and the effect of the body of rules which regulate the extra-territorial recognition of rights.

(*e*) General Principle No. V., p. 59, *ante*.

(*f*) General Principle No. VI., pp. 60—64, *ante*.

(*g*) General Principle No. III., p. 40, *ante*.

BOOK I.

PRELIMINARY MATTERS.

BOOK I. treats of matters which are in strictness preliminary to the Rules contained in Books II. and III.

Chapter I. contains the interpretation of certain terms, such for example as "country," "foreign country," and the like, which often occur in the subsequent Rules, and the accurate apprehension whereof facilitates the understanding of the whole Digest.

Chapter II. contains Rules for determining a given person's domicile.

Chapter III. contains Rules for determining a person's "nationality," in so far, at least, as it is necessary for the application of the Rules contained in Books II. and III. to decide whether he is, or is not, a British subject.

The principles, it is true, which regulate the acquisition, or loss, of domicile or of nationality are not in themselves rules for determining the extra-territorial effect of law, and may therefore seem to lie outside the scope of this treatise. But the application of many of our Rules, and notably of those relating to testamentary and intestate succession, frequently depends upon the ascertainment of a person's domicile, and occasionally upon determining whether he is a British subject or an alien. The reader therefore should have before him the principles which regulate the acquisition, loss, and resumption, both of domicile and of British nationality.

CHAPTER I.

INTERPRETATION OF TERMS (*a*).

I. GENERAL DEFINITIONS.

IN the following Rules and Exceptions, unless the context (*b*) or subject-matter otherwise requires, the following terms have the following meanings.

1. "This Digest" means the Rules and Exceptions contained in Books I. to III. of this treatise.

2. "Court" means His Majesty's High Court of Justice in England (*c*).

3. "Person" includes a corporation or body corporate (*d*).

4. "Country" means the whole of a territory subject under one sovereign to one system of law (*e*).

5. "State" means the whole of the territory (the limits whereof may or may not coincide with those of a country) subject to one sovereign (*f*).

6. "Foreign" means not English (*g*).

(*a*) The terms defined are intended to bear in the Rules and Exceptions which make up the Digest the meaning here given them. It is not meant that they should necessarily have the same sense in the comment which accompanies the Digest. To restrict in the comment the use of every term used in the Digest to the special meaning there given it, would involve the employment of strained or unnatural language without conducing to the intelligibility or precision of the comment.

(*b*) The sense given to a term in this clause is occasionally varied in express words in some of the subsequent Rules. See, *e.g.*, definition of "Court," Rule 67, p. 312, *post*.

(*c*) And, if and so far as the Court of Appeal has original jurisdiction, includes the Court of Appeal.

(*d*) See p. 69, *post*.

(*e*) See p. 69, *post*.

(*f*) See p. 71, *post*.

(*g*) See p. 71, *post*.

7. "Foreign country" means any country which is not England (*h*).

8. "England" means the territory of England, including the Principality of Wales and the town of Berwick-on-Tweed, and includes any ship of the Royal Navy wherever situate (*i*).

9. "United Kingdom" means the United Kingdom of Great Britain (England and Scotland) and Ireland, the islands and the territorial waters adjacent thereto, but does not include either the Isle of Man or the Channel Islands (*k*).

10. "British dominions" means all countries subject to the Crown, including the United Kingdom, and the territorial waters adjacent thereto.

11. "Domicil" means the country which in accordance with the Rules (*l*) in this Digest is considered by English law to be a person's permanent home (*m*).

12. "Independent person" (*n*) means a person who as regards his domicil is not legally dependent, or liable to be legally dependent, upon the will of another person.

13. "Dependent person" means any person who is not an independent person as hereinbefore defined, and includes :

- (i) a minor;
- (ii) a married woman.

14. "An immovable" means a thing which can be touched but which cannot be moved, and includes, unless the contrary is expressly stated, a chattel real (*o*).

(*h*) See p. 71, *post*.

(*i*) See p. 72, *post*.

(*k*) Certain islands, though not physically forming part of the United Kingdom, are by law held to be part of the United Kingdom; such, *e.g.*, are Shetland, which despite its great distance from Scotland is part of Scotland, and the Isle of Wight, which is part of England. Certain other islands, the Isle of Man and the Channel Islands, are held by law not to be part of the United Kingdom. The difference of treatment depends not on physical but on historical causes.

(*l*) See Rules 1 to 18, and, as to domicil of corporations, Rule 19, *post*.

(*m*) Compare p. 84, *post*.

(*n*) See p. 73, *post*.

(*o*) See p. 75, *post*.

15. "A movable" means a thing which is not an immovable, and includes :

- (i) a thing which can be touched and can be moved, and
- (ii) a thing which is the object of a claim (*p*), and cannot be touched, or, in other words, a *chose in action*.

16. "*Lex domicilii*," or "law of the domicil," means the law of the country where a person is domiciled (*q*).

17. "*Lex loci contractus*" means the law of the country where a contract is made (*r*).

18. "*Lex loci solutionis*" means the law of the country where a contract is to be performed (*s*).

19. "*Lex situs*" means the law of the country where a thing is situate (*t*).

20. "*Lex fori*" means the local or territorial law of the country to which a Court, wherein an action is brought, or other legal proceeding is taken, belongs (*u*).

Comment.

(3) *Person* (*x*).—The word "person," both in law and even as used in common conversation, includes not only a natural person or human being, but also an artificial person or, speaking broadly, a corporation. This wide sense is the meaning given to the word in this Digest.

It must, however, be remembered that every definition is to be taken subject to the reservation "unless the context or subject-matter otherwise requires." There are many Rules which can obviously apply only to natural persons (*y*).

(4) *Country*.—The word "country" has among its numerous significations the two following meanings (*z*), which require to be carefully distinguished from one another.

(*p*) See p. 75, *post*.

(*r*) See p. 77, *post*.

(*t*) See p. 78, *post*.

(*x*) Only those terms are commented upon which need some explanation.

(*y*) *E.g.*, Rule 8, *post*.

(*z*) It means, for example (in its geographical sense), "a geographical district making up a separate part of the physical world," as in the expression, a newly

(*q*) See p. 77, *post*.

(*s*) See p. 78, *post*.

(*u*) See p. 78, *post*.

(i) A country, in what may be called the political sense of the word, means "the whole of the district or territory, subject to one sovereign power" (a), such as France, Italy, the United States, or the British Empire.

A country in this sense is sometimes called a "realm," with reference to the sovereign and his authority over the territory and over his subjects therein. It is sometimes termed a "state," in one of the many meanings of that word, when considered in reference to the citizens and their allegiance to the sovereign who has authority over the territory.

The word "country" is not, in this Digest, used in its political sense of a realm or *Staté*.

(ii) A country, in what may be called the legal sense of the word, means "a district or territory, which (whether it constitutes the whole or a part only of the territory subject to one sovereign) is the whole of a territory subject to one system of law;" such, for example, as England, Scotland, or Ireland, or as each of the States which collectively make up the United States.

For the term "country," in the legal sense of the word, there is no satisfactory English substitute. If the use of a new term be allowable, a country might, in this sense (on the analogy of the Latin *territorium legis* and the German *Rechtsgebiet*), be called a "law district," and this expression is occasionally used in this treatise.

The term "country" is throughout this Digest, and generally (though not invariably) in the body of the work, used in its legal sense of law district.

It is worth while to dwell a little further upon the relation between the meaning of the word country in its political sense of realm and its legal sense of law district.

discovered country. It means again (in what may be termed its historical sense) a land inhabited, or supposed to be inhabited, by one race or people, as, for instance, Italy, before the Italians were united under one Government. Neither the geographical nor the historical sense of the word directly concern writers on law, but the geographical sense is worth notice, as putting in ordinary language a limit to the use of the word in its political and legal senses. There is an awkwardness, though one which cannot be avoided, in calling the whole British Empire one "country" in the political sense of the term. The awkwardness is due to the excessive deviation in this application of the word from its more ordinary geographical sense.

(a) The term sovereign or sovereign power is, it need hardly be observed, not used here in the sense of a king or monarch, but in the sense in which it is employed by jurists, of the power, whatever its form, which is supreme in an independent political society. See Austin, *Jurisprudence* (4th ed.), i. p. 249.

Territories ruled by different sovereigns never constitute one country in either sense of the term, but a territory ruled by one and the same sovereign, *i.e.*, a realm, though it may as a fact constitute one country or law district, may also comprise several such countries or law districts.

Thus France, Italy, and Belgium, each constitute one separate country in both senses of the term. France (including, of course, in that term French dependencies) is one country in the political sense of the word, and is also one country or law district in the legal sense of the term. On the other hand, the British Empire, while constituting one country, realm, or State in the political sense of the term country, consists of a large number of countries in the legal sense of the word, since England, Scotland, Northern and Southern Ireland, the Isle of Man, the different Dominions, provinces, States, colonies, &c., are in this sense separate countries or law districts.

(5) *State*.—The word “state” has various senses. It is often used as meaning a political society, governed by one and the same sovereign power. Here it is used in contrast with country as the whole of the territory, subject to one sovereign power. The limits of a State obviously may, or may not, coincide with the limits of a country.

(6) *Foreign*, and (7) *Foreign Country*.—The word “foreign” means, as used throughout this Digest, simply “not English.” Thus, a Scottish parent is as much within the term foreign parent as an Italian or a French parent. The expression “foreign country” means any country except England, and applies as much to Scotland, Ireland, New Zealand, &c., as to France or Italy (b).

(b) See, however, *In re Orr-Ewing* (1882), 22 Ch. D. (C. A.) 456, 464, 465, for an objection by Jessel, M. R., to the use of the word “foreign,” as applied to Scotland. His objection, in effect, is that Scotland is not a foreign country, but “ever since the union of the kingdom of Great Britain . . . has been an integral part of Great Britain.” The reply to this objection is, first, that Scotland, though of course not a “foreign” country in the sense in which the word “foreign” is popularly and rightly used in ordinary discourse, certainly is a “foreign” country in the sense in which these words are defined in this treatise, and, secondly, that such a definition is both justifiable and convenient in a book treating of the conflict of laws. The justification is to be found in the fact that English Courts do, in regard to questions having reference to the conflict of laws, in most, though not quite in all respects, treat Scotland and Ireland as “foreign countries,” or, in other words, the rules of private international law are applied by the High Court in England in pretty much the same manner to all other countries, whether they are or are not subject to the

(8) *England*.—The word “England” is used in its ordinary sense of England and Wales, including any adjacent islands, such as the Isle of Wight or Anglesea, which form part of, or are, English or Welsh counties. The word, however, is by our definition extended so as to include a ship of the Royal Navy wherever situate, *e.g.*, when lying in an Italian port (*c*); such a ship is, it is said (*d*), regarded by a fiction of law as part of the parish of Stepney. In any case, a person on board thereof is within the territorial jurisdiction of the High Court, *i.e.*, is considered as being in England, and Order XI. r. 1, as to service of a writ out of the jurisdiction (*e*), is inapplicable to him (*f*). A British merchant ship, when on the high seas, is normally subject to English law (*g*), but under what circumstances, and to what extent, she is to be considered as part of England is open to some question (*h*).

(11) *Domicil*.—A person’s domicil is the place or country which is considered by English law to be his permanent home (*i*).

This merely verbal definition of the term “domicil” applies to all cases in which the word is used. Whenever a person of any description is said to be domiciled, or to have his domicil, in a particular country, *e.g.*, France, the least which is meant is that he is considered by the Courts to have his permanent home in France, and will be treated by them as being settled in France,

British Crown. This fact is made prominent, as it ought to be, by applying to all countries, except England, the epithet “foreign.”

(*c*) *Seagrove v. Parks*, [1891] 1 Q. B. 551.

(*d*) See Annual Practice, 1921, p. 85; *Fraser v. Akers* (1891), 35 S. J. 477.

(*e*) Compare Rule 60, and Exceptions thereto, *post*.

(*f*) *Seagrove v. Parks*, [1891] 1 Q. B. 551.

(*g*) The Commonwealth Constitution Act, 1900, s. 5, provides for the application of the laws of the Commonwealth to all British ships (other than the King’s ships of war) whose first port of clearance and whose port of destination is in the Commonwealth; conf. Keith, *Imperial Unity and the Dominions*, pp. 216—221. As to the limitations of the doctrine that a ship is part of the territory of the country whose flag it carries, see *R. v. Keyn* (1876), 2 Ex. D. 63, 93, 94, per Lindley, L. J.; *Chartered Bank of India v. Netherlands Co.* (1883), 10 Q. B. D. 521, 544.

(*h*) The answer to this question may conceivably affect the validity of a marriage on board a British merchant ship. See p. 669, note (*p*), *post*. A person born on board a British ship, whether in foreign territorial waters or not, is a natural-born British subject: British Nationality Act, 1914, s. 1, sub-s. 1 (*c*). A person born on board a foreign ship (*i.e.*, non-British ship) shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth. *Ibid.*, s. 1, sub-s. 2. See Rule 22, p. 173, *post*.

(*i*) See Rules 1 to 19, *post*.

or, in other words, that France is considered by the Courts to be his permanent home.

The words "considered by English law" are important, and point to the fact that a person's domicile need not necessarily be his actual home; or, to put the same thing in another form, that the existence of a domicile is not a mere question of fact, but an inference of law drawn from the facts, whatever they may be, from which the Courts infer that a person has a domicile in a particular country.

This very general definition applies further to the domicile of both the classes of persons known to the law (that is to say):

(1) Natural persons (or human beings).

(2) Legal persons (or corporations).

Any more specific, and therefore narrower, definition of the term would not cover the domicile both of human beings and of corporations. For further information as to the nature and meaning of domicile, the reader is referred to the Rules explaining its meaning or nature, with reference, first, to natural persons (*k*); secondly, to corporations (*l*).

(12) *Independent Person*, and (13) *Dependent Person*.—An independent person means a person who, as regards the legal effect of his acts, is not dependent on the will of any other person, or, in other words, whose will is for legal purposes exercised by himself, and by himself alone. Since the term is used in this Digest with reference to a person's legal capacity for acquiring or changing his domicile by his own acts, it means, as here used, a person legally capable of effecting a change of domicile, and who is not liable to have it changed by the act of any other person (*m*).

The position of an independent person has two characteristics, the one positive, the other negative. The positive characteristic is the full legal capacity to act for himself, especially in the change of domicile. The negative characteristic is freedom from liability to be legally acted for, and especially to have his domicile changed at the will of another person.

(*k*) See Rules 1 to 18, *post*.

(*l*) See Rule 19, *post*.

(*m*) Such a person as is here described by the term independent person is often called, both by judges and text-writers, a person *sui juris*. This expression is borrowed from Roman law. It is a convenient one, but is purposely avoided on account of the difficulty of transferring without some inaccuracy the technical terms of one legal system to another. A reader, however, should bear in mind that, in reference to domicile, a person *sui juris* means, when the term is used, what is here called an independent person.

Under English law a man of full age, or an unmarried woman of full age, is such an independent person.

A dependent person means a person who, as regards the legal effects of his acts, is dependent, or liable to be dependent, on the will of another person, or, in other words, whose will, as regards its legal effects, cannot be exercised by himself, and may be exercised by another person. Since the term is used in this Digest with reference to a person's legal capacity for acquiring or changing his domicile by his own acts, it means, as here used, a person who is not legally capable of effecting a change of domicile for himself, but whose domicile is liable to be changed (if at all) by the act of another (*n*).

The position of a dependent person has therefore two characteristics, the one negative, the other positive. The negative characteristic is legal incapacity to act for himself, especially in the change of domicile. The positive characteristic is liability to be legally acted for, and especially to have his domicile changed for him by the act of another person.

Under different legal systems, different classes of persons are dependent persons. Under English law the two classes which indubitably fall within the term as already explained are—first, minors; and, secondly, married women (*o*).

Neither of these classes has the legal capacity to make a change of domicile, and both of these classes are liable to have it changed by the act of another person, who in the case of minors (*p*) is generally the father, and in the case of married women (*q*) is always the husband.

The term “liable” in the definition should be noticed. It covers the case of a person (such as an infant without living parents or guardians) of whom it cannot be said that there is at the moment any person on whom he is dependent, or who can change his domicile. The infant is, however, even then not an independent person in the sense in which the word is here used.

(*n*) Such a dependent person is often termed by judges and text-writers a person not *sui juris*; the term, though convenient, is avoided in these rules for the same reason for which the corresponding term person *sui juris* is not employed.

(*o*) Lunatics are purposely not added. Their position in respect of capacity to effect a change of domicile is not free from doubt, but the better view seems to be that a lunatic's domicile cannot be changed by his committee. See comment on Rule 18, *post*.

(*p*) Rule 9, Sub-Rule 1, *post*.

(*q*) Rule 9, Sub-Rule 2, *post*.

He is legally incapable of changing his own domicile (*r*), and liable to have it changed (if at all) by the act of a person appointed guardian (*s*).

(14) *An Immovable, and* (15) *A Movable.*

(i) The subjects of property are in general (*t*) throughout this treatise divided into immovables and movables, and under the latter head are included all things which do not fall within the description of immovables.

Immovables are tangible things which cannot be moved, such as are lands and houses, whatever be the interest or estate which a person has in them. Hence the term includes what English lawyers call "chattels real," that is to say, land, &c., in which a person has less than a freehold interest, as, for instance, leaseholds.

Movables are, in the first place, such tangible things as can be moved, *e.g.*, animals, money, stock in trade, and in general terms goods; and, in the second place, "things" (using that word in a very wide sense indeed) which are the objects of a claim (*e.g.*, payment of money due from *X* to *A*), called by English lawyers "*choses in action*," in one of the senses (*u*) of that ambiguous term.

It is convenient to group under the one head of movables goods and *choses in action* (the objects of a legal claim), for neither class falls under the head of immovables, and each class is in many respects, as regards the conflict of laws, subject to the same rules. There is, however, this essential distinction between goods and *choses in action*, that goods have in fact a local situation, and *choses in action* (*e.g.*, debts) have not. Hence, those Rules as to movables which depend upon an article having a real local situation, *i.e.*, occupying a definite space, do not, except by analogy, apply to *choses in action* (*x*).

(ii) The division of the subjects of property into immovables

(*r*) Rule 10 and Sub-Rule, *post*.

(*s*) *Pottinger v. Wightman* (1817), 3 Mer. 67; *In re Beaumont*, [1893] 3 Ch. 490.

(*t*) In some Rules, as, for example, those referring to administration, and in Rules which are intended to follow verbatim the words of an Act of Parliament, it is sometimes necessary to use to a limited extent the ordinary English division into realty and personalty, or real property and personal property.

(*u*) *Chose in action* is used for—

(i) the claim or right to a performance or service legally due from one man to another;

(ii) the thing claimed, *e.g.*, the debt due;

(iii) the evidence of the claim, *e.g.*, the bond on which a debt is due.

(*x*) See Rule 153, p. 565, *post*.

and movables does not square with the distinction known to English lawyers between *things real*, or real property (*y*), and *things personal*, or personal property (*z*).

For though all things real are, with certain exceptions, included under immovables, yet some immovables are not included under things real; since "chattels real" (*a*), or, speaking generally, leaseholds, are included under immovables, whilst they do not, for most purposes, come within the class of realty, or things real.

On the other hand, while all movables are, with certain exceptions, included under things personal, or personalty, there are things personal, viz., chattels real, or, speaking generally, leaseholds, which are immovables, and are in no way affected by the Rules hereinafter laid down as to movables.

To put the same thing in other words, "immovables" are equivalent to realty, with the addition of chattels real or leaseholds; "movables" are equivalent to personalty, with the omission of chattels real.

(iii) Law is always concerned, in truth, not with things but with rights (*b*), and therefore not directly with immovables or movables, but with rights over, or in reference to, immovables or movables, or, to use popular language, with immovable property and movable property. It will serve to make clear the relation between the division into immovables and movables, and the division into realty and personalty, if we treat each as a division, not of the subject of property, but of the rights of which property from a legal point of view consists.

Immovable property includes all rights over things which cannot be moved, whatever be the nature of such rights or interests (*c*).

Movable property includes both rights over movable things or goods, and rights which are not rights over a definite thing, but

(*y*) See 1 Steph. Comm. (14th ed.), pp. 92, 93.

(*z*) See 2 Steph. Comm. (14th ed.), pp. 1—8.

(*a*) Chattels real include estates for years, at will, and by sufferance. See 1 Steph. Comm. (14th ed.), p. 160.

(*b*) See as to this point, and for an account of the different meanings of the word "property," Williams, Real Property (23rd ed.), pp. 3—6. What is particularly to be noted is that "property" in English law, as in ordinary language, means either (1) ownership in things, or (2) the things in which, or with regard to which, ownership may exist, or, to put the same thing more generally, property means either (i) rights legally capable of being exchanged for money, or (ii) the things (if any) which are the objects of such rights.

(*c*) Mortgages are immovables. See *In re Hoyles, Row v. Jagg*, [1910] 2 Ch. 333, 336; [1911] 1 Ch. (C. A.) 179; and as to terms immovables and movables, judgment of Farwell, L. J., [1911] 1 Ch. pp. 184, 185.

are claims by one person against another (*e.g.*, the claim by *A* to be paid a debt due to him by *X*, or generally to the performance of a contract made with him by *X*), or in other words, which are *choses in action*.

Realty, looked at as a division of rights, includes all rights over things which cannot be moved, except chattels real.

Personalty, looked at as a division of rights, includes both rights over movables and *choses in action*, and further includes chattels real, or leaseholds.

Hence, immovable property is equivalent to realty, with the addition of chattels real; movable property is equivalent to personalty, with the omission of chattels real.

It is of consequence to notice the difference between movables and personal property, because judges, especially in the earlier cases on the conflict of laws, have occasionally used language which identifies movables with personal property (*d*), and suggests the conclusion that all kinds of personalty, including leaseholds, are, as regards the conflict of laws (*e.g.*, in the case of intestate succession), governed by the rules which apply to movables properly so called. This doctrine has now been pronounced erroneous, and leaseholds (it has been decided) are, as regards the conflict of laws, to be considered of course as personalty, but also as immovables (*e*).

(16) *Lex domicilii*.—What is the country in which a person is domiciled must be determined in accordance with the Rules hereinafter stated (*f*). It may even here be remarked that domicile is a totally different thing from residence.

A French citizen is permanently settled in England, but is residing for a time at Paris. The law of his domicile is the law of England.

(17) *Lex loci contractus*.—The expression *lex loci contractus*, at any rate as used by English Courts, is ambiguous.

(1) It means the law of the country or place where a contract

(*d*) See, *e.g.*, *Sill v. Worswick* (1791), 1 H. Bl. 665, 690, judgment of Lord Loughborough; *Birtwhistle v. Vardill* (1826), 5 B. & C. 438, 451, 452, judgment of Abbott, C. J.; *Forbes v. Steven* (1870), L. R. 10 Eq. 178. Story habitually uses the terms personal property, personal estate, and the like, as meaning movables.

(*e*) *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Irish Rep. 9 Eq. 541; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123. Compare *Duncan v. Lawson* (1889), 41 Ch. D. 394; *Pepin v. Bruyère*, [1902] 1 Ch. (C. A.) 24. Conf. Westlake, ss. 164—169.

(*f*) See Rules 1—19, *post*.

is made or entered into. This is the sense in which it is always employed in this Digest, and is also the sense in which it is generally employed in the earlier English cases on the conflict of laws.

(2) It often means the law by which the parties who make a contract intend it to be governed,—the law, in short, to which the contract is made subject, in accordance with the intention of the parties, or, as it is often called, the proper law of the contract (*g*).

These two laws constantly do in fact coincide, that is, are one and the same law, as where *X* in London sells goods to *A*, to be delivered and paid for in London. But they need not coincide. A marriage contract, or settlement, is made in England between *X* and *A*, who are a Scots man and woman domiciled in Scotland. It appears, either from the express terms or indirectly from the language of the instrument, that the contract is intended to be carried out in accordance with the law of Scotland. In such a case the *lex loci contractus*, in the first sense of that term (the sense in which the term is used in this Digest), is clearly the law of England; the *lex loci contractus*, in the second sense of that term, is as clearly the law of Scotland (*h*).

(18) *Lex loci solutionis*.—*X* contracts in London to deliver goods to *A* in Italy. The *lex loci solutionis* is the law of Italy.

(19) *Lex situs*.—*X* leaves by will to *A* lands in England, money in France, and furniture in Italy.

The *lex situs*, as regards the land, is the law of England; as regards the money, the law of France; as regards the furniture, the law of Italy (*i*).

(20) *Lex fori*.—This expression, it should be noted, always means the *local or territorial* law of the country to which a Court wherein the action is brought, or other legal proceedings are taken, belongs.

(*g*) See Rule 155, p. 572, *post*.

(*h*) See App., Note 5, "Preference of English Courts for *Lex loci contractus*." The *lex loci contractus*, in the sense in which it is used in this Digest, is merely one species of the *lex actus*, or the law of a place where a legal transaction takes place.

(*i*) It may be well, though it is hardly necessary, to point out that the object of these examples is to illustrate the meaning of the *lex situs*; they are not intended to show what is the law applicable to the things in question. As a matter of fact, succession to these things would be determined by an English Court, as regards the land, in accordance with the *lex situs*, but as regards the money and furniture, in accordance with the *lex domicilii*, of the testator.

Hence the term excludes the application of any law other than the local law; and this is so whether the country referred to be England or a foreign country. If, for instance, the assertion be made in reference to England that the Courts, as to certain matters (*e.g.*, procedure), always follow the *lex fori*, or, in other words, the law of England, what is meant is that, when an action, &c. is brought in an English Court, every matter of procedure is determined in accordance with the ordinary local or territorial law of England, and that this is so, even though the case have in it a foreign element, as where an Italian brings in England an action against a Frenchman for the breach of a contract made in Germany. So again, if a similar assertion be made with reference to Italy, what is meant is that, when an action is brought in an Italian Court, every matter of procedure is determined according to the ordinary local or territorial law of Italy, and that this is so, even though the case have in it a foreign element, as where an Englishman brings in Italy an action against a Frenchman for the breach of a contract made in New York.

II. APPLICATION OF TERM "LAW OF COUNTRY."

In this Digest the law of a given country(*k*), (*e.g.*, the law of the country where a person is domiciled)

- (i) means, when applied to England, the local or territorial(*l*) law of England;
- (ii) means, when applied to any foreign country, any law, whether it be the local or territorial law of that country or not, which the Courts of that country apply to the decision of the case to which the Rule refers(*m*).

Comment.

Law of country.—The term law of a country, *e.g.*, the law of England or the law of Italy, is, as already explained(*n*),

(*k*) See as to the ambiguity of the term "law of a country," Intro., pp. 6, 7, *ante*.

(*l*) See as to the meaning of local or territorial law, Intro., p. 6, *ante*.

(*m*) This clause must of course be read subject to the definition of *lex fori*, under which such law always means local or territorial law.

(*n*) See Intro., p. 6, *ante*.

ambiguous (*o*). It means in its narrower and most usual sense the territorial or local law of any country, *i.e.*, the law which is applied by the Courts thereof to the decision of cases which have in them no foreign element (*p*). It means in its wider sense all the principles or maxims, including, it may be, foreign law and the rules of the conflict of laws (*q*), which the Courts of a country apply to the decision of cases coming before them.

The Rules contained in this Digest state the principles according to which English Courts will determine what is the particular country, the law whereof is to be applied to the decision of a given case having in it any foreign element; these Rules, whether they lead to the application of English or of foreign law, are all Rules for the decision of cases coming before an English Court.

When these considerations are borne in mind, the varying meaning of the expression law of a country becomes intelligible.

(1) *When country England*.—When any Rule, applied to the circumstances of a given case, designates England as the country the law whereof is to determine the case, or, in other words, directs that the case be determined in accordance with the law of England, then the term “law of England” must mean the local or territorial law of England. If the term were used in a more general sense and meant the law or principle, whatever it might be, which an English Court would apply to the case, the Rule would constitute an unmeaning truism; for we are dealing with cases decided by an English Court, and it is clear from the nature of things that any case so decided must be determined in accordance with some law or principle which the English Court applies to it (*r*).

Thus, Rule 193 (*s*) states (*inter alia*) that the succession to the movables of an intestate is governed by the law of his domicile, *i.e.*, by the “law of the country” where he is domiciled, at the time of his death.

D, an intestate, dies domiciled in England. He is a French

(*o*) So also are of course its equivalents, such as English law or Italian law, and terms of which it forms a part, such as *lex domicilii*, or “law of the country where a man is domiciled,” or *lex situs*, or “law of the country where a thing is situate.” *In re Johnson*, [1903] 1 Ch. 821, is not in reality inconsistent with this, but it has been doubted whether the case is rightly decided. See App., Note 1, “Law of a Country and the *Renvoi*.”

(*p*) See Intro., p. 1, *ante*.

(*q*) See *In re Queensland Mercantile & Agency Co.*, [1892] 1 Ch. (C. A.) 219, 226, per Lindley, L. J.

(*r*) See Intro., pp. 2—4, *ante*.

(*s*) See chap. xxxi., *post*.

citizen resident in Italy. He leaves movables in England. Our Rule applied to the case designates England as the country in accordance with the law whereof his movables must be distributed, or in other words directs that his movables be distributed according to the local or territorial law of England, *i.e.*, in accordance with the Statute of Distribution. If by the law of England were, under these circumstances, meant some principle (*t*), whatever it might happen to be, which the English Courts would apply to the case, the Rule would afford no guidance whatever.

(2) *When country is a foreign country.*—When any Rule applied to the circumstances of a given case designates a foreign country, *e.g.*, Italy, or the Isle of Man, as the country the law whereof is to determine the case, or in other words directs that the case be determined in accordance with the law of Italy, then the term “law of Italy” means, unless the contrary is expressly stated, any principle or body of law which the Italian Courts hold applicable to the particular case. The Rule in effect directs that English Courts shall decide the case with reference to the law, whatever it be, according to which the Italian Courts would decide it.

Thus *D*, an intestate, dies domiciled in Italy. He is a French citizen resident in Italy. He leaves movables in England. Again apply Rule 193. The Rule applied to this case designates Italy as the country in accordance with the law whereof *D*’s movables must be distributed; it directs, that is to say, that his movables be distributed according to the law of Italy. But the expression “law of Italy” here means not necessarily the territorial law of Italy, but any law which the Italian Courts would apply to the decision of the particular case. This might be the territorial law of Italy, but it might be, as in fact it probably is (*u*), the territorial law of France. However this be, the Rule is here not unmeaning. It states that English Courts will determine a case which obviously contains foreign elements, in accordance with the law, whatever it may be, which the Italian Courts hold applicable to the case (*x*).

(*t*) See Intro., pp. 2, 4, *ante*.

(*u*) See Codice Civile del Regno d’ Italia, Art. 7.

(*x*) “When it is said that the law of the country of domicile must regulate the succession, it is not always meant to speak of the general law [*i.e.*, what has been called in this treatise the local or territorial law], but, in some instances, of the particular law which the country of domicile applies to the case of foreigners dying domiciled there, and which would not be applied to a natural-born subject of that country. Thus in *Collier v. Rivaz* (2 Curt. 855),

"the testator, an English-born subject, died domiciled in Belgium, leaving a will not executed according to the forms required by the Belgian law: By that law, the succession in such a case is not to be governed by the law of the country applicable to its natural-born subjects, but by the law of the testator's own country: And it was held [in England] that the will, being valid according to the law of England, ought to be admitted to probate." 1 Williams, Exors. (11th ed.), p. 271; see also *Pechell v. Hildersley* (1869), L. R. 1 P. & D. 673; *In Goods of Lacroix* (1877), 2 P. D. 94. "The idea," it has been pointed out, "that the law of a particular country does not mean the ordinary law of the land, but the law which would be applied by [the Courts of] that country to a given case,—a view which is sufficiently familiar to English students of private international law, is by no means so well known in France." See "The Bourgoise Case in London and Paris," by Malcolm McIlwraith, 6 L. Q. Rev. 379, 387 (n.).

Two observations are worth making:—

1. The ambiguity in the expression "law of a country" would, for the purpose of this Digest, and indeed of private international law generally, cease to be of great importance were all nations agreed on the principles governing the choice of law. Were this so, which is of course far from being the case, the term "law of a country" would always mean the territorial law of such country. Thus, if the Italian Courts agreed with the Courts of England in referring succession to movables wholly to the *lex domicilii*, the rule that succession to movables is governed by the law of the country where an intestate dies domiciled would mean that if he died domiciled in England, succession to his movables was governed by the territorial law of England, and that if he died domiciled in Italy, it was governed by the territorial law of Italy.

2. The illustrations given in the text of the meaning of the term "law of a country," when applied to England and to a foreign country respectively, refer to the *lex domicilii*, but the principle which they illustrate applies with one exception to every other class of law, *e.g.*, to the *lex situs*, or "law of a country where a thing is situate." The one exception is the *lex fori*. This by its very definition always means the local or territorial law of the country to which a Court wherein legal proceedings are taken belongs. See pp. 69, 78, *ante*.

CHAPTER II.

DOMICIL (*a*).(A) DOMICIL OF NATURAL PERSONS (*b*).

I. NATURE OF DOMICIL.

RULE 1.—The domicile of any person is the place or country which is considered by English law to be his permanent home (*c*).

This is—

- (1) in general, the place or country which is in fact his permanent home ;
- (2) in some cases, the place or country which, whether it be in fact his home or not, is determined to be so by a rule of English law.

Comment and Illustrations.

No definition (*d*) of domicile has given entire satisfaction to English judges. As, however, a person's domicile may certainly be

(*a*) Story (8th ed.), chap. iii. ss. 39—49; Westlake, chap. xiv.; Foote, chap. ii. (4th ed.), pp. 48—66; Savigny, ss. 350—355, Guthrie's transl. (2nd ed.), pp. 86—114.

(*b*) For domicile of natural persons, *i.e.*, human beings, see Rules 1—18. For domicile of legal persons or corporations, see Rule 19, *post*.

(*c*) "Domicil meant permanent home, and if that was not understood by 'itself, no illustration could help to make it intelligible." *Whicker v. Hume* (1858), 28 L. J. Ch. 396, 400, per Lord Cranworth; *Attorney-General v. Rowe* (1862), 31 L. J. Ex. 314, 320. See further, as to the meaning of "home," pp. 84—88, *post*.

(*d*) See App., Note 6, "Definition of Domicil." For the purposes of private international law, the "place" within which it is required to determine a man's domicile is always, or almost always, a "country," in the sense in which the word has been hereinbefore defined. The words "place or" might, therefore, in strictness, be omitted from this rule. It is, however, convenient to give a general description of domicile applicable to any place, whether it be a State, a country, a town, &c., within the limits whereof it may be desired to determine a person's domicile. See further, pp. 94—97, *post*.

described as the place or country which is considered by law to be his home, and as a place or country is usually (though not invariably) "considered by law" (*i.e.*, by the Court) to be a person's home, because it is so in fact, light is thrown on the nature of domicile by a comparison between the meanings of the two closely connected terms, home and domicile.

Home.—The word "home" is not a term of art, but a word of ordinary discourse, and is usually employed without technical precision. Yet, whenever a place or country is termed, with any approach to accuracy, a person's home, reference is intended to be made to a connection or relation between two facts. Of these facts the one is a physical fact, the other a mental fact.

The physical fact is the person's "habitual physical presence," or, to use a shorter and more ordinary term, "residence" (*e*), within the limits of a particular place or country. The mental fact is the person's "present intention to reside permanently, or for an "indefinite period," within the limits of such place or country; or, more accurately, the absence of any present intention (*f*) on his

(*e*) The term "residence" is used by some writers as synonymous with the word "home," *i.e.*, as including both "residence," in the sense in which the word is used in the text, and the "intention to reside" (*animus manendi*). To this use of the word "residence" there is in itself no objection, but there is great convenience in appropriating (as is done throughout this treatise) the substantive "residence" and the verb "reside" to the description of the physical fact which is included in, but does not make up the whole of, the meaning of the word "home." "Residence" has, in many instances, been employed by judges and others to denote a person's habitual physical presence in a place or country which may or may not be his home. See, *e.g.*, *Jopp v. Wood* (1865), 34 L. J. Ch. 212, 218; *Gillis v. Gillis* (1874), Irish Rep. 8 Eq. 597. It is hoped, therefore, that the restriction of the term "residence" to this sense alone does not involve too wide a deviation from the ordinary use of language.

Though it is of little importance in which sense the words "residence" and "reside" are employed, it is of considerable importance that they should be used in one determinate sense. Confusion has sometimes arisen from the employment of the word "residence" at one time as excluding, and at another time as including, the *animus manendi*. Compare *Jopp v. Wood* (1865), 34 L. J. Ch. 212; 4 De G. J. & S. 616, with *King v. Foxwell* (1876), 3 Ch. D. 518.

The word "habitual," in the definition of residence, does not mean presence in a place either for a long or for a short time, but presence there for the greater part of the period, whatever that period may be (whether ten years or ten days), referred to in each particular case.

(*f*) See Story, s. 43, for the remark that the absence of all intention to cease residing in a place is sufficient to constitute the *animus manendi*. The difficulty of determining where it is that a person has his home, or domicile, arises in general from the difficulty, not only of defining, but of ascertaining, the existence of the very indefinite intention which constitutes the *animus manendi*. See *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284, 292, language of Bramwell, B.

part to remove his dwelling permanently, or for an indefinite period, from such place or country. This mental fact is technically termed, though not always with strict accuracy, the *animus manendi* (*g*), or "intention of residence."

When it is perceived that the existence of a person's home in a given place or country depends on a relation between the fact of residence and the *animus manendi*, further investigation shows that the word home, as applied to a particular place, or country, may be defined or described in the following terms, or in words to the same effect.

Definition of home.—*A person's home is that place or country, either (i) in which he, in fact, resides with the intention of residence (animus manendi) (h), or (ii) in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence (animus manendi), or (iii) with regard to which, having so resided there, he retains the intention of residence (animus manendi), though he in fact no longer resides there (i).*

This definition or formula has undoubtedly a crabbed appearance. It, however, accurately describes all the circumstances or cases under which a given person, *D* (*k*), may, with strict accuracy, be said to have a home in a particular country, *e.g.*, England, or, in other words, in which England can be termed his home, and excludes the cases in which England cannot with accuracy be termed his home. The first clause of the formula or definition describes the conditions under which a home is acquired. The second and third clauses describe the conditions under which a home is retained. The meaning and effect of the whole definition is most easily seen from examples of the cases in which, under it, a country can, and a country cannot, be considered *D*'s home.

The cases to which the formula can be applied are six.

(1) *D* is a person residing in England, without any intention of leaving the country for good, or of settling elsewhere. England is

(*g*) It is often, in strictness, rather the *animus revertendi et manendi* than the *animus manendi*.

(*h*) The term *animus manendi*, or intention of residence, is intended to include the negative state of mind, which is more accurately described as "the absence of any present intention not to reside permanently in a place or country."

(*i*) More briefly, a person's "home" is "that place or country in which either he resides, with the intention of residence (*animus manendi*), or in which he has so resided, and with regard to which he retains either residence or the "intention of residence."

(*k*) *D* is, throughout this chapter, used to designate the person, either whose domicile is in question, or upon whose domicile a legal right depends, or may be supposed to depend.

clearly *D*'s home. His position is, in fact, the position of every ordinary inhabitant. There exists in his case exactly that combination of residence and of purpose to reside required by the first clause of the definition. The time for which his residence may have lasted is immaterial. A person may have resided in a country for a month, for a year, or for ten years; it may have been his residence for a longer or a shorter period; but from the moment when there exists the required combination of residence and intention to reside permanently (*animus manendi*) the country is his home, or, in popular language, he has his home in the country (*l*).

(2) *D*, an inhabitant of England, who has hitherto intended to continue residing there, makes up his mind to settle in France. His home, however, continues to be English till the moment when he leaves the country. It is till then retained by the fact of residence, though the *animus manendi* has ceased to exist. *D* intends to abandon, but until he leaves the country, has not actually abandoned England as his home. This is the case of an intended change of home which has not actually been carried out. It falls within the second clause of the definition of home.

(3) *D* is an inhabitant of England, who has for years intended to live permanently in England. He goes to France for business or pleasure, with the intention of returning to England and residing there permanently. England is still his home. It is so because the intention of residence (*animus manendi*) is retained, although *D*'s actual residence in England has ceased.

The case falls precisely within the third clause of the definition of home.

(4) *D* has never, in fact, resided, and has never formed any intention of permanently residing in England. That *D*, under these circumstances, does not possess an English home is too clear for the matter to need comment (*m*).

The case is one which obviously does not fall within, and is, in fact, excluded by, the definition already given of a home.

(*l*) See, as to the relation of time of residence to domicile, comment on Rule 17, *post*. "It may be conceded that if the intention of permanently residing in a place exists, residence in that place, however short, will establish a domicile." *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Chelmsford.

(*m*) The one apparent exception to this remark is the case of children and others, who have the home of some person (*e.g.*, a parent) on whom they depend. The explanation is that such persons are considered as sharing the home of the person on whom they depend, rather than in strictness possessing a home of their own. See Rule 9 and Sub-Rules 1 and 2, *post*.

(5) *D*, who has been permanently residing in France, is for the moment in England, but has never formed the least intention of permanent residence there, being a traveller who has come to England for a time to see the country. He clearly has not, either in strictness or in accordance with ordinary notions, a home in England, and it is also clear that his case does not fall within the terms of the definition.

(6) *D*, lastly, is a person who has been permanently residing in France, but has formed an intention of coming to England, where he has not been before, and settling there. He has not yet quitted France. England clearly is not his home, and the case is one manifestly excluded from the terms of the definition (*n*).

From our formula, as illustrated by these examples, the conclusion follows that, as a home is acquired by the combination of actual residence (*factum*) and of intention of residence (*animus*), so it is (when once acquired) lost, or abandoned, only when *both* the residence *and* the intention to reside cease to exist. If, that is to say, *D*, who has resided in England as his home, continues either to reside there in fact, or to retain the intention of residing there permanently, England continues to be his home. On the other hand, if *D* ceases both to reside in England and to entertain the intention of residing there permanently, England ceases to be his home, and the process of abandonment is complete. If, to such giving up of a home by the cessation both of residence and of the *animus manendi*, we apply the terms "abandon" and "abandonment," the meaning of the word home may be defined with comparative brevity.

A "home" (as applied to a place or country) means "the place "or country in which a person resides with the *animus manendi*, "or intention of residence, or which, having so resided in it, he "has not abandoned."

This definition or description of a home, in whatever terms it is expressed, gives rise to a remark which will be found of considerable importance. This is that the conception of a place or country as a home is in no sense a legal or a technical idea, since it arises from the relation between two facts, "actual residence" and "intention to reside," neither of which has anything to do with

(*n*) Cases (4), (5), and (6) are, it may be said with truth, simply cases (1), (2), and (3) looked at, so to speak, from the other side. The six cases or examples, however, describe the six different relations in which a person may stand in respect of residence and *animus manendi* towards a given country, and are each worth observing in reference to questions which may arise as to domicile.

the technicalities of law. A person might have a home in a place where law and Courts were totally unknown, and the question whether a given place is or is not to be considered a particular person's home is in itself a mere question of fact, and not of law (*o*).

It is worth while to insist on the non-legal, or natural character of the notion signified by the word "home," because from the definition of a home, combined with knowledge of the ordinary facts of human life, flow several conclusions which have a very close connection with the legal rules determining the nature, acquisition, and change of domicile.

Results of definition of "home."—Of these results, flowing from the definition of a home, considered merely as a natural fact, without any reference to legal niceties or assumptions, the following are the principal:—

First. The vast majority of mankind (in the civilised parts of the world, at least) have a home, since they generally reside in some country, *e.g.*, England or France, without any intention of ceasing to reside there. It is nevertheless clear (if the thing be looked at merely as a matter of fact, without any reference to the rules of law) that a person may be homeless (*p*). There may be no country of which you can at a given moment with truth assert that it is in fact *D*'s home.

D, for example, may be an English emigrant, who has left England for good, but is still on his voyage to America, and has not yet reached Boston, where he intends to settle. He has lost his home in England; he has not gained a home in America. He is in the strictest sense homeless. Here the residence which is the basis of a home does not exist. *D*, again, may be a traveller, who has abandoned his English home, with the intention of travelling from land to land, for an indefinite period, and with the fixed purpose of never returning to England. In this case also *D* is homeless. He has no home, because he does not entertain that intention of residence, which goes to make up the notion of a home. *D*, again, may be a vagabond, *e.g.*, a gipsy who wanders from country to country, without any intention of permanently

(*o*) For the bearing of this remark on the law of domicile, see comment on Rule 7, *post*; *In re Tootal's Trusts* (1883), 23 Ch. D. 532; and Westlake (5th ed.), s. 243; *Casdagli v. Casdagli*, [1919] A. C. 145. A British subject whose domicile of origin was English can acquire a domicile of choice in Egypt.

(*p*) Contrast Rule 2, p. 98. *post*, as to domicile.

residing in any one place. Here, again, *D* is homeless, because of the total want of any *animus manendi* (*q*).

In these (and perhaps in some other) instances a person is as a matter of fact homeless, and if, as we shall find to be the case (*r*), he is considered by law to have a home in one country, rather than in another, or, in other words, if he has a domicile, this is the result of a legal convention or assumption. He acquires a home not by his own act, but by the operation of law.

Secondly. The definition of home suggests the inquiry, which has, in fact, been sometimes raised in the Courts (*s*), whether a person can have more than one home at the same time, or, in other words, whether each of two or more countries can at the same moment be the home of one and the same person?

The consideration of what is meant by "home" shows that (if the matter be considered independently of all legal rules) the question is little more than one of words.

The following state of facts certainly may exist. *D* determines to live half of each year in France and half in England. He possesses a house, lands, and friends, in each country. He resides during each winter in his house in the South of France, and spends each summer in his house in England. His intention is to pursue the same course throughout his life. He entertains, in other words, the intention of continuing to reside in each country for six months in every year.

If the question be asked whether *D* has two homes, the answer is that the question is mainly one of language. If the intention entertained by *D* to reside in each country be not a sufficient *animus manendi* as to each, then *D* is to be numbered among the persons who in fact have no home. If it be a sufficient *animus manendi*, then *D* is correctly described as having two homes (*t*).

Thirdly. The abandonment (*u*) of one home may either coincide with, or precede, the acquisition of a new home. In other

(*q*) See for these cases of homelessness, Savigny, s. 354, Guthrie's transl. (2nd ed.), p. 107.

(*r*) See Rule 2, p. 98, *post*.

(*s*) See Rule 3, p. 99, *post*.

(*t*) The question raised, though almost a verbal one, has given some trouble to writers on domicile. They have here as elsewhere somewhat confused a question of fact and a question of law, and have occasionally failed to distinguish the question of fact, whether *D* can independently of legal rules have two homes, from the legal question, whether it is or is not a rule of law that a man cannot have more than one domicile.

(*u*) See Rule 8, p. 121, *post*.

words, abandonment of one home may be combined with settlement in another home, or else may be the simple abandonment of one home without the acquisition of another.

D, for example, goes from England, where he is settled, to France on business. At the moment of leaving England, and on his arrival in France, he has the fullest intention of returning thence to England, as his permanent residence. This purpose continues for the first year of his residing in France. *D*, therefore, though living in France, still retains his English home. At the end of the year he makes up his mind to reside permanently in France. From that moment he acquires a French, and loses his English home. The act of acquisition and the act of abandonment exactly coincide. They must, from the nature of the case, be complete at one and the same moment.

The act of abandonment, however, often precedes the act of acquisition. *D* leaves England with the intention of ultimately settling in France, but journeys slowly to France, travelling through Belgium and Germany. From the moment he leaves England his English home is lost, since from that moment he gives up both residence and intention to reside in England, but during his journey no French home is acquired, for, though he intends to settle in France, residence there cannot begin till France is reached. The relation between the abandonment of one home and the acquisition of another deserves careful consideration, for two reasons.

The first reason is, that the practical difficulty of deciding in which of two countries a person is at a given moment to be considered as domiciled arises (in general) not from any legal subtleties, but from the difficulty of determining at what moment of time a person resolves to make a country in which he happens to be living his permanent home. The nature of this difficulty is well illustrated by a reported case. The question to be determined was, whether *D*, who at one time possessed a home in Jamaica, had or had not in the year 1838 acquired a home in Scotland. No one disputed that in 1837 he had left Jamaica for good and was residing in Scotland. It was further undisputed that some years later than 1838 he had acquired a Scottish home or domicile. The matter substantially in dispute was whether at the date in question *D* had made up his mind to reside permanently in Scotland. The case came on for decision in 1868, and *D* himself gave evidence as to his own intentions in 1838. His honesty was undoubted, but the Court, though having the advantage of *D*'s own evidence,

found the question of fact most difficult to determine, and in the result took a different view (chiefly on the strength of letters written in 1838) from that taken by *D* himself of what was then his intention as to residence (*x*).

The second reason is, that there exists a noticeable difference between the natural result of abandonment and the legal rule (*y*) as to its effect. As a matter of fact, a person may abandon one home without acquiring another. As a matter of law, no man can abandon his legal home or domicile without, according to circumstances, either acquiring a new or resuming a former domicile.

Fourthly. From the fact that the acquisition of a home depends upon freedom of action or choice, it follows that a large number of persons (*z*) either cannot, or usually do not, determine for themselves where their home shall be. Thus, young children cannot acquire a home for themselves; boys of thirteen or fourteen, though they occasionally do determine their own place of residence, more generally find their home chosen for them by their father or guardian; the home of a wife is usually the same as that of the husband; and, speaking generally, persons dependent upon the will of others have, in many cases, the home of those on whom they depend. This is obvious, but the fact is worth notice, because it lies at the bottom of what might otherwise appear to be arbitrary rules of law, *e.g.*, the rule that a wife can in no case have any other domicile than that of her husband (*a*).

(*x*) *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307. Compare *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

(*y*) See Rule 8, p. 121, *post*.

(*z*) See Rule 9, p. 126, and Sub-Rules, *post*.

(*a*) From an examination into the meaning of the word "home," when it is strictly employed, we can trace the connection between the word when used with accuracy and its application in various lax or metaphorical senses.

In all cases there exists a more or less distinct reference to the ideas of residence and intention to reside. Thus, when a lodger says he is "going home" to his lodging, the place where he lives is certainly not a permanent residence. Still, the speaker intends to look upon it for the moment in the character of a more or less permanent abode.

A colonist, again, calls England his home. In the mouth of the original settler the expression may perhaps have been used at first with accuracy, and have been an assertion of his intention to return and reside in England, (*animus revertendi*).

He or his children continue to use the expression when no real intention to return any longer exists. What is then meant is that the speaker entertains towards England the sentiments which a person is supposed to entertain towards the land which is in reality his home.

In these and like instances may be traced a transition from inaccurate state-

Domicil not same as home.—As a person's domicil is the place or country which is considered by law to be his home, and as the law in general holds that place to be a man's home which is so in fact, the notion naturally suggests itself that the word "domicil" and the word "home" (as already defined) mean in reality the same thing, and that the one is merely the technical equivalent for the other.

"It occurred to me," says Baron Bramwell, ". . . whether 'one might not interpret this word 'domicil' by substituting the word 'home' for it; not home in the sense in which a man who has taken a lodging for a week in a watering-place might say he was going home, nor home in the sense in which a colonist, born in a colony, intending to live and die there, might say he was coming home, when he meant coming to England; but using the word 'home' in the sense in which a man might say, 'I have no home; I live sometimes in London, sometimes in Paris, sometimes in Rome, and I have no home'" (b).

The notion, however, expressed in the passage cited is fallacious. This idea, that the word home means, when strictly defined, the same thing as the term domicil, is based on the erroneous assumption that the law always considers that place to be a person's home which actually is his home, and on the omission to notice the fact that the law in several instances attributes to a person a domicil in a country where in reality he has not, and perhaps never had, a home. Thus the rule that a domiciled Englishman, who has in fact abandoned England without acquiring any other home, retains his English domicil (c), or the principle that a married woman is always domiciled in the country where her husband has his domicil, involves the result that a person may have a domicil who has no home, or that a woman may occasionally have her domicil in one country, though she has her real home in another. A person, further, may reside and intend to reside, and therefore in fact have his home, in a country, though on account of the character of the country English Courts may refuse to treat it as his domicil. Thus an Englishman who resides at Shanghai with the intention of residing there permanently, and without any idea of returning to England, dies at

ment of fact to the use of conscious metaphor. What is worth notice is that the ideas of "residence" and of "intention to reside" are not entirely absent from even the metaphorical uses of the word "home."

(b) *Attorney-General v. Rowe* (1862), 31 L. J. Ex. 314, 320, per Bramwell, B.

(c) See Rule 8, *post*.

Shanghai. He has at the moment of his death a home in China, but he dies not with a Chinese, but with an English domicile (*d*). An attempt, therefore, to obtain a complete definition of the legal term domicile by a precise definition of the non-legal term home can never meet with complete success, for a definition so obtained will not include in its terms the conventional or technical element which makes up part of the meaning of the word domicile (*e*).

The question may naturally occur to the reader, why is it that the term domicile should not be made to coincide in meaning with the word home, or, in other words, why is it that the Courts consider in some instances that a place is a person's home which is not so in fact?

The answer is as follows: It is for legal purposes of vital importance that every man should be fixed with some home or domicile, since otherwise it may be impossible to decide by what law his rights, or those of other persons, are to be determined. The cases, therefore, of actual homelessness must be met by some conventional rule, or, in other words, a person must have a domicile or legal home assigned to him, even though he does not possess a real one. It is, again, a matter of great convenience that a person should be treated as having his home or being domiciled in the place where persons of his class or in his position would, in general, have their home. The law, therefore, tends to consider that place as always constituting a person's domicile which would generally be the home of persons occupying his position. Thus the home of an infant is generally that of his father, and the home of a wife is generally that of her husband. Hence the rule of law assigning to an infant, in general, the domicile of his father, and to a married woman, invariably, the domicile of her husband.

These considerations of necessity or of convenience introduce into the rules as to domicile that conventional element which makes

(*d*) *In re Tootal's Trusts* (1883), 23 Ch. D. 532, with which compare *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431. See, however, *Casdagli v. Casdagli*, [1919] A. C. 145, which shows that an Englishman can acquire a domicile in Egypt, and which reviews the earlier cases; and compare the American case, *Mather v. Cunningham* (1909), 105 Maine Rep. 326, where the same rule was laid down for a citizen of the United States.

(*e*) This conclusion is confirmed by an examination of the received definitions of domicile. They are all, or nearly all, definitions of a domicile of choice, *i.e.*, a domicile acquired by the party's own act, and do not include the cases in which domicile is imposed (independently of the party's choice) by a rule of law; but a "domicile of choice" is nearly, or all but, equivalent to the word "home." As to domicile of choice, see Rule 7, p. 109, *post*. See also App., Note 6, "Definition of Domicil."

the idea itself a technical one and different from the natural conception of home. As these conventional rules cannot be conveniently brought under any one head, there is a difficulty in giving a neat definition of domicile as contrasted with home. Since, however, the Courts generally hold a place to be a person's domicile because it is in fact his permanent home, though occasionally they hold a place to be a person's domicile because it is fixed as such by a rule of law, a domicile may accurately be described in the terms of our Rule, and we may lay down that a person's domicile is in general the place or country which is in fact his permanent home, though in some cases it is the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

Comparison of home and domicile.—The word home denotes a merely natural and untechnical conception, based upon the relation between a person's residence and his intention as to residence. The term domicile is a name for a legal conception, based upon, and connected with, the idea of home, but containing in its elements of a purely legal or conventional character. Whether a place or country is a man's home is a question of fact. Whether a place or country is a man's domicile is a question of mixed fact and law, or rather of the inference drawn by law from certain facts, though in general the facts which constitute a place a man's home are the same facts as those from which the law infers that it is his domicile.

Area of domicile.—One remark which is applicable both to home and domicile deserves attention, and has reference to what we may term the "place," or "area," of domicile.

The description given in this treatise of a "home" (*f*), as also the definition of "domicile" (*g*) (for in this point they need not be distinguished), suits, it will be observed, any "place" whatever its limits, and applies equally well to a house or to a country. Thus if *D* resides at No. 1, Regent Street, with the intention of permanently residing in that house, the definition of home suits that house no less than it suits England, and if any legal result were to depend upon *D*'s living at No. 1, Regent Street, rather than in Westminster, the definition of domicile would apply to No. 1, Regent Street, as being the place which is considered by law to be *D*'s home. It will also be observed that, though the words home and domicile, as used in this treatise, are applicable

(*f*) See p. 85, *ante*.

(*g*) See Rule 1, p. 83, *ante*.

to any place whatever, yet the "place" obviously contemplated throughout the Rules relating to domicile is a "country" or "territory subject to one system of law" (*h*). The reason for this is that, though the maxims for the determination of a person's domicile are in principle equally applicable, whatever the area or the extent of the place within which a person's domicile is to be determined, the main object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal home or domicile within a territory governed by one system of law, *i.e.*, within a given country, rather than within another. When once his domicile in a given country is determined, the question within what part of that country (or law district) he is domiciled becomes, for the purpose of this treatise, immaterial. To decide whether *D* has his legal home in England is important, because upon that fact depends whether certain of his rights are or are not affected by English law. To determine whether *D* has his legal home in Middlesex or in Surrey is, for the purpose of this treatise, unimportant, since in either case he comes within the operation of the same system of law.

If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it might be important to determine whether *D* was domiciled within such particular part, *e.g.*, Brittany, of the whole country, France; but in this case, such part would be *pro tanto* a separate country, in the sense in which that term is employed in these Rules.

It may, indeed, be suggested that the two inquiries, whether *D* is domiciled in England, and whether *D* has his domicile or home in a particular place or house in England, are inevitably connected, because England cannot be *D*'s domicile unless he has a home, or is assumed by law to have a home, at some particular place, or in some particular house, in England. This suggestion rests on the idea that a person cannot be domiciled in a country unless he has a domicile at some particular place in that country. This notion, however, is (it is conceived) erroneous (*i*).

It is, of course, obvious that if *D* has a home or domicile in one particular place in a country, he is domiciled in that country, *e.g.*, England, and within any wider area or territory including that country, *e.g.*, the United Kingdom; it is also clear that in this

(*h*) See pp. 70, 71, *ante*.

(*i*) Conf. *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441, especially judgment of Brett, L. J., p. 457.

case the reason why *D* is known to be domiciled in England is that he is known to have a home at some definite place in England, *e.g.*, No. 1, Regent Street, where he resides with the intention of residing in that house permanently; but though the fact of a person having a domicile in one part of England establishes for certain and is in general the ground on which you know that he is domiciled in England, the converse does not hold good. *D* may reside in England, with the full intention of residing permanently in England, and may therefore be domiciled there, and this fact may be well known, and capable of proof, and yet there may be no one place in England which can be termed *D*'s home, or domicile, within the terms of our definition (*k*). This has been thus laid down, by a Scottish judge:—

“I cannot admit what Lord Fullerton assumes to be the rule, “that, in order to make a domicile, it is necessary to have some “particular spot within the territory of a law—that it is not “enough that the party shall have an apparently continual residence there, but shall actually have a particular spot, or remain “fixed in some permanent establishment. In considering the “*indicia* of domicile these things are important; but they are not “necessary, as matters of general law, to constitute domicile. “Many old bachelors never have a house they can call their own. “They go from hotel to hotel, and from watering-place to watering-place, careless of the comfort of more permanent residence, “and unwilling to submit to the *gêne* attendant on it. There was “the case of a nobleman who always lived at inns, and would have “no servants but waiters; but he did not lose his domicile on that “account.

“If the purpose of remaining in the territory be clearly proved “*aliter*, a particular home is not necessary” (*l*).

(*k*) For definition of “home,” see p. 85, *ante*.

(*l*) *Arnott v. Groom* (1846), 9 D. 142, p. 150, per Lord Jeffrey. The fact, however, that a person has no one place at which he permanently resides in England may be evidence of his not having the intention to reside permanently in England, and therefore of his not intending to make England his home. “It appears to me,” says Chitty, J., “that I must take into consideration the “nature and character of the residence, and it appears that the intestate in this “case was moving about England, and I think his shifting about from place “to place shows a fluctuating and unsettled mind; and that the fact of residence, “although for twenty-two years, standing alone without any other circumstances “to show the intention, is insufficient to warrant me in coming to the conclusion “that he intended to make England his home. . . . It would be difficult to say “that he had any home in England, although . . . it may be considered that, “if there was an intention shown by any other acts on his part, such as the pur-

The principle laid down in the passage cited is of importance. For if many of the received and best definitions of domicile be adopted, and the unnecessary assumption be also made that a person who is domiciled in a country must be necessarily domiciled at some definite place in that country, the result will follow that persons whom every one will admit to have an English domicile cannot be shown to be domiciled in England.

Take, for example, Story's definition of the term domicile, viz., "that place in which [a person's] habitation is fixed without any "present intention of removing therefrom" (*m*), and apply it to the following case: *D* is a Frenchman, settled for years in England, but living in lodgings at Manchester. His full intention is to live permanently in England, but he has no intention of residing more than a limited time in Manchester. His intention may be to spend his life successively in different parts of England, or his purpose may be to go after six months to London, and occupy a house there (which he has already bought) for the rest of his life. Under these circumstances, there is no one place in England which is his home or domicile. Manchester is not his home, because though he resides there, he has not, and never had, as regards Manchester, any intention of permanent residence. No other place in England

"chase of land . . . or any other circumstance, even a slight circumstance, then "I should have been warranted in coming to a different conclusion. But as the "facts stand, I cannot say that . . . this retired old soldier did intend finally "to throw off his Scotch domicile and to make himself, or rather his succession, for "that is the only point of any materiality, subject to the law of England." *In re Patience* (1885), 29 Ch. D. 976, 984, per Chitty, J. This language is not absolutely inconsistent with, but is on the whole opposed to, the doctrine of Lord Jeffrey in *Arnott v. Groom*. The last words (it is submitted) of Mr. Justice Chitty's judgment must not be understood as laying down that if *A* was domiciled in England, anything depended upon his intention as to succession. The intention as to residence fixes his domicile, but, his domicile being once fixed, the law thereof fixes the rules of succession independently of the intestate's intention. See also *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

Westlake apparently agrees with the view taken in the text that a man may be domiciled in a country without having his domicile at any particular place therein. "Domicile," he writes, "being necessarily connected either with law or with "jurisdiction, or with both, must always be in a territory, though it need not be "at any particular spot in the territory. It may be in England, but need not "be at York or the like; it may be in India, but need not be at Calcutta or "the like." Westlake (5th ed.), s. 243. See also *In re Bullen Smith* (1888), 58 L. T. 578, and, above all, *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

(*m*) Story, s. 43. See *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441. In this case the testator certainly was domiciled in England, for he "had the intention of residing in England permanently," but it can hardly be said that he was domiciled in his house in London, which he took on a lease for three years.

is his home, because though he may intend to reside in London, he has not begun to reside there in fact. The solution of the difficulty, which might in fact arise with reference, *e.g.*, to the disposition of *D*'s property, if he were to die before leaving Manchester, is that though not domiciled at any one place in England, he has an English domicile, since, with regard to England, there exists on *D*'s part both residence and the *animus manendi* (*n*).

RULE 2.—No person can at any time be without a domicile(*o*).

Comment.

“It is a settled principle that no man shall be without a “domicil” (*p*). “It is clear that by our law a man must have “some domicile” (*q*), or (to use the expression of another authority) “it is undoubted law that no man can be without a “domicil” (*r*).

The principle here laid down is, in effect, that for the purpose of determining a person's legal rights or liabilities, the Courts will invariably hold that there is some country in which he has a

(*n*) The fact which should be constantly kept in mind is, that domicile may be defined for different purposes with reference to different areas, and further, that a person may have a full intention of residence as to one place or area, and not as to any narrower place or area within it. In other words, *D* may have the fullest intention of residing permanently in France or England, but may not have an intention of residing permanently in London or Paris. The question as to the place or area within a country to which a person's intention of residence applies may conceivably become of importance. Thus *D*, a Frenchman, resides at Strasburg in 1870, and goes abroad without any intention of abandoning France as his home. He dies immediately after the cession of Strasburg to Germany. The question (presuming that the Treaty of Cession made no provision for such cases) might arise as to whether *D*'s domicile were French or German at the date of his death. The question ought, according to the principles maintained by the English Courts, to be determined with reference to *D*'s intention. If, on the one hand, it were known that he intended to leave Strasburg, though not to abandon France, his domicile would be French. If, on the other hand, it were known that he intended to reside permanently at Strasburg, his domicile might be maintained to be German. The very question whether a person could be domiciled in a country, without being domiciled in any particular place in it, was, through the separation of Queensland from New South Wales, nearly raised in *Platt v. Attorney-General of New South Wales* (1878), 3 App. Cas. 336, but was not definitely decided.

(*o*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 453, 457; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307.

(*p*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury.

(*q*) *Ibid.*, p. 448, per Hatherley, C.

(*r*) *Ibid.*, p. 453, per Lord Chelmsford.

home, and will not admit the possibility of his being in fact homeless (*s*), or, in other words, even if he is in fact homeless, a home will, for the purpose of determining his legal rights, or those of other persons, always be assigned to him by a presumption or fiction of law. The mode by which this result is achieved will appear from Rules laid down in this chapter (*t*). It consists for the most part in the assumption that every one for whom no other domicile can be found retains what is called his domicile of origin (*u*), *i.e.*, the domicile assigned to him by a rule of law at the time of his birth, combined with the principle that a domicile is retained until it is changed by the act of the domiciled person himself, or in some cases by the act of a person on whom he is dependent (*x*).

RULE 3.—Subject to the exception hereinafter mentioned, no person can have at the same time more than one domicile (?) (*y*).

Comment and Illustrations.

“It is clear that, by our law, a man must have some domicile, and must have a single domicile” (*z*).

The Courts, when called upon to determine rights, *e.g.*, of succession, depending on *D*'s domicile at a given time, will assume as a rule of law that *D* was at the time in question domiciled in some one country only.

Thus the question, who is to succeed to *D*'s property, as far as its decision depends upon the law of *D*'s domicile, will always be

(*s*) See as to the principle that not only has a person always a home, but that his home can always be ascertained, Rule 12, p. 139, *post*.

(*t*) See Rules 4—18, pp. 103—166, *post*.

(*u*) See Rule 6, p. 106, *post*.

(*x*) Rules 4 and 9, pp. 103, 126, *post*.

(*y*) In support of this Rule, see *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 448; *Somerville v. Somerville* (1801), 5 Ves. 750; 5 R. R. 155; *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden Aktiengesellschaft*, [1911] 2 K. B. (C. A.) 516, 526, 527; and note especially the absence of any case in which a person has been held to have more than one domicile at the same time. But see *contra*, *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985; *Croker v. Marquis of Hertford* (1844), 4 Moore, P. C. 339.

According to Savigny, a person may have more than one domicile (Savigny, s. 354, Guthrie's transl. (2nd. ed.), p. 107). See for a discussion of the whole subject, Phillimore, ss. 51—60.

A doubtful Rule or statement in this Digest is marked with a query.

(*z*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 448, per Hatherley, C.

determined with reference to the law of one country alone. If it be doubtful whether *D* was at his death domiciled in England or in Scotland, the minutest evidence will be weighed in order to settle in which of the two countries he had his legal home, but our Courts will always decide that he died domiciled in one country only, and will not admit the possibility of his dying domiciled in two countries.

Question.—*Can a person have different domicils for different purposes?*

It is clear that no man can for the same purpose, *i.e.*, when the determination of one and the same class of rights is in question, be taken to have a domicile in more countries than one at the same time.

A doubt has, however, been raised, whether a person cannot have at the same moment a domicile in one country for the determination of one class of rights (*e.g.*, rights of succession), and a domicile in another country for the determination of another class of rights (*e.g.*, capacity for marriage).

"I apprehend," says Pollock, C. B., "that a peer of England, who is also a peer of Scotland, and has estates in both countries, who comes to Parliament to discharge a public duty, and returns to Scotland to enjoy the country, is domiciled both in England and Scotland. A lawyer of the greatest eminence, formerly a member of this Court, and now a member of the House of Lords, to whose opinion I, in common with all the profession, attach the greatest importance, once admitted to me that for some purposes a man might have a domicile both in Scotland and England. I cannot understand why he should not" (*a*).

"The facts and circumstances," writes Phillimore, "which might be deemed sufficient to establish a commercial domicile in time of war, and a matrimonial, or forensic, or political domicile in time of peace, might be such as, according to English law, would fail to establish a testamentary or principal domicile. 'There is a wide difference,' it was observed in a judgment delivered in a recent case before the Judicial Committee of the Privy Council, 'in applying the law of domicile to contracts and 'to wills'" (*b*).

(*a*) *In re Capdevielle* (1864), 33 L. J. Ex. 306, 316, per Pollock, C. B. Compare *Somerville v. Somerville* (1801), 5 Vesey, 749a, 786; 5 R. R. 161, per Arden, M. R.

(*b*) Phillimore, s. 54; *Croker v. Marquis of Hertford* (1844), 4 Moore, P. C. 339.

If the notion suggested by these authorities be correct, Rule 3 must be modified, and run:—

“No person can, *for the same purpose*, have at the same time more than one domicile.”

The Rule, however, as it stands, is probably correct. The notion that a person may be held in strictness to have been domiciled in Scotland for the purpose of determining the validity of his will, and to have been domiciled at the same moment in Germany for the purpose of determining the validity of his marriage (in so far as that depends upon domicile), is opposed to the principles by which the law of domicile is governed, and is not, it is believed, supported by any decided case.

The prevalence of the notion is due to two causes:—

First. The term “domicil” is often used in a lax sense, meaning no more than is meant by the term “residence,” as used in this treatise. Thus, a “forensic domicile,” or a “commercial domicile,” often signifies something far short of domicile, strictly so called. Now, it is obvious that a person may have a “residence” in one place and a “domicil” in another (*c*), and that residence may often be sufficient to confer rights, or impose liabilities (*d*). It is from cases in which “residence” alone has been in question that the possibility of contemporaneous domicils in different countries for different purposes has suggested itself. Thus, *D*, though domiciled in France, can, if present in England, be sued in our Courts. This fact has been expressed by the assertion that *D* has a forensic domicile in England,—an expression which certainly countenances the notion that *D* is for one purpose domiciled in England and for another in France. A forensic domicile, however, means nothing more than such residence in England as renders *D* liable to be sued; the co-existence, therefore, of a forensic domicile in one country, and of a full domicile in another, is simply the result of the admitted fact that a person who resides in England may be domiciled in France, and does not countenance the idea that *D* can in strictness be at one and the same moment domiciled both in France and in England.

Secondly. The inquiry, which of two countries is to be considered a person’s domicile, has (especially in the earlier cases) been confused with the question, whether one person can at the same time have a domicile in two countries (*e*).

(*c*) *Gillis v. Gillis* (1874), L. R. Ir. 8 Eq. 597.

(*d*) *E.g.*, to the payment of income tax. *Attorney-General v. Coote* (1817), 4 Price, 183; 16 & 17 Vict. c. 34, s. 2.

(*e*) See *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341.

D is a Scotsman. He has a family estate in Scotland. He purchases a house and marries in England, where he generally lives with his wife. He, however, visits Scotland every summer, and goes to his estate there during the shooting season.

On his death in England intestate, a question arises as to the succession to *D*'s movable property (*f*).

The question must be decided with reference to the law of Scotland, or of England, according to the view taken of *D*'s domicile.

The decision depends on a balance of evidence. Probably if there are no other circumstances than those stated, the Courts will hold him domiciled in England (*g*).

Exception.—A person within the operation of the Domicile Act, 1861, 24 & 25 Vict. c. 121, may possibly have one domicile for the purpose of testate or intestate succession, and another domicile for all other purposes.

Comment and Illustrations.

The Domicile Act, 1861, empowers the Crown to make with any foreign State a convention to the effect that no British subject resident at the time of his death in the foreign country to which the convention applies, and no subject of such country resident at the time of his death in the United Kingdom, shall be deemed, for the purposes of testate or intestate succession to movables, to have acquired a domicile in the country where he dies, unless he has fulfilled the requirements as to making a written declaration of his intention to become there domiciled, and otherwise, of the Act. This enactment, apparently, applies only to domicile for the purposes of testate or intestate succession, and does not affect a person's domicile for other purposes.

If a convention were made under the Act (*h*), *e.g.*, with France, a case such as the following might arise.

D, a British subject, who has been domiciled in England,

(*f*) Rule 193, *post*.

(*g*) See *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341, compared with *Aitchison v. Dixon* (1870), L. R. 10 Eq. 589.

(*h*) No convention has been made under the Act, which is, therefore, at present a dead letter.

The terms "foreign" and "country" used in the Act have not the precise sense given to these terms in this Digest.

becomes resident and (except in so far as the matter is affected by the Act) acquires a domicile in France. He has not fulfilled the requirements of the Domicile Act, 1861. He dies in France whilst there resident. A question arises as to succession to *D*'s movables (*i*). He will be deemed for this purpose not to have acquired a French domicile, but to have retained his English domicile.

A question also arises as to the legitimacy of *D*'s child (*k*), born in France, after *D*'s acquisition of a French domicile.

This question must probably be decided on the view of *D*'s being domiciled in France.

D, therefore, will be held for one purpose to have had an English, and for another to have had a French, domicile at the same time.

RULE 4.—A domicile once acquired is retained until it is changed

- (1) in the case of an independent person (*l*), by his own act;
- (2) in the case of a dependent person (*m*), by the act of some one on whom he is dependent.

Comment and Illustrations.

The principle here enunciated may (it being granted that no one can have more than one domicile) appear too obvious to need statement, but requires to be attended to, as it lies at the bottom of most of the rules as to the acquisition and change of domicile.

D is in possession of an English domicile. This domicile he will retain until some act is done, on the part of the person capable of changing it, which amounts to the legal acquisition or resumption by *D* of another domicile.

If *D* is a man of full age, then the person capable of changing his domicile is *D* himself, and *D* will retain his English domicile until some act on his own part which has the legal effect of changing it for, *e.g.*, a French domicile (*n*).

(*i*) See chap. xxxi., *post*.

(*k*) See Rule 146, p. 521, *post*.

(*l*) See for meaning of term, pp. 73—75, *ante*.

(*m*) See for meaning of term, pp. 73—75, *ante*.

(*n*) As to the mode in which one domicile can be changed for another, and the difference in this respect between the domicile of origin and a domicile of choice, see Rule 8, p. 121, *post*.

If *D* is a minor, the person capable of changing *D*'s domicile is the person on whom *D* is, for this purpose at any rate, dependent, who in most instances is *D*'s father. *D* retains his domicile until some act on the part of his father changes it. The only act, it may even here be added, which can have that effect is a change in the father's own domicile (*o*).

II. ACQUISITION AND CHANGE OF DOMICIL.

Domicil of Independent Persons (p).

RULE 5.—Every independent person has at any given moment either

- (1) the domicile received by him at his birth (which domicile is hereinafter called the domicile of origin) (*q*), or,
- (2) a domicile (not being the same as his domicile of origin) acquired or retained (*r*) by him while

(*o*) See Rule 9, Sub-Rule 1, p. 127, *post*.

(*p*) See for meaning of term, pp. 73—75, *ante*.

(*q*) See Rule 6, p. 106, *post*. The expression domicile of origin, though borrowed from Roman law, has a different sense from the expression *domicilium originis*. Savigny, ss. 351, 352, Guthrie's transl. (2nd ed.), pp. 88—96.

(*r*) The word "retained" is inserted to cover the case of a person who on coming of age is in possession of a domicile, not being that of origin, which was acquired for him by his father during infancy. *D* is born in England, where his father, *A*, is then domiciled. During *D*'s infancy his father acquires or resumes a French domicile, and when *D* comes of age is domiciled in France. *D*'s domicile at the moment of his coming of age is French, and is retained as a domicile of choice until *D* does some act whereby he changes his domicile. Westlake (s. 261), however, holds that *D*'s domicile at the time of his coming of age is retained as a domicile of origin, not as a domicile of choice. The difference between the two views is of importance in connection with change of domicile. (Rule 8, p. 121, *post*.) If *D*'s French domicile is retained as a domicile of choice, then by leaving France for good without any intention of settling definitely elsewhere, *D* resumes his English domicile; if, on the other hand, *D*'s French domicile is retained as a domicile of origin, he can resume an English domicile only by actual residence in England with the intention of continuing to reside there. Westlake similarly holds that if *D*, a girl, whose domicile of origin is English, marries a Frenchman, on his death her domicile in France is retained as a domicile of origin, not choice. In the absence of any conclusive authority, this point, which is referred to as doubtful in *re Craignish*, *Craignish v. Hewitt*, [1892] 3 Ch. 180, 184, per Chitty, J., must be left undecided, but it may fairly be held that a domicile acquired later than at birth can hardly be regarded as anything but a domicile of choice. See *Crumpton's Judicial Factor v. Finch-Noyes*, [1913]

independent by his own act (which domicile is hereinafter called a domicile of choice)(*s*).

Comment and Illustrations.

Every independent person, which term includes every man or (unmarried) woman, of full age, has at any given moment of his life either the same domicile as that which he received at birth, technically called the domicile of origin, or a different domicile which he has acquired when of full age, by his own act and choice, technically called a domicile of choice.

The fact to be noticed is, that an independent person cannot, by any possibility, be at any time without one or other of these domiciles. If he is at any moment not in possession of his domicile of origin, he is in possession of a domicile of choice. If he is at any moment not in possession of a domicile of choice, then he is at that moment in possession of a domicile of origin. That this is so results from the rule of law that any person *sui juris*, who at any moment has no other domicile, is assumed to be in possession of his domicile of origin (*t*).

D's domicile of origin is, we will suppose, English. What the rule lays down is, that *D*, being an independent person, will at any moment be found to be domiciled either in England or in some other country, such as France, in which he has settled, or acquired for himself a home (*u*). It is of course possible (as before pointed out) (*x*) that *D* may be in fact homeless, as where he has left England for good, and has not yet settled in France, or where, having settled in France, he has left France for good and is on his way to America; but under these circumstances he has his domicile or legal home in England (*y*), *i.e.*, he is legally in possession of his domicile of origin.

The two domiciles differ from each other in two respects: first, in their mode of acquisition (*z*); and secondly, in the mode in which they are changed (*a*).

S. C. 378, 389—391, per Lord Johnston; *In re Macreight* (1885), 30 Ch. D. 165, where the two domiciles were treated as perfectly distinct, and Westlake's view would evidently not have been followed.

(*s*) See Rule 7, p. 109, *post*.

(*t*) Compare Rule 8, p. 121, *post*.

(*u*) Rule 3, p. 102, *ante*, precludes the possibility of *D*'s being domiciled both in England and in France.

(*x*) See p. 88, *ante*.

(*y*) See Rule 8, p. 121, *post*.

(*z*) See Rules 6 and 7, *post*.

(*a*) See Rule 8, *post*.

Domicil of Origin.

RULE 6.—Every person receives at (or as from) birth a domicil of origin (*b*).

- (1) In the case of a legitimate child born during his father's lifetime, the domicil of origin of the child is the domicil of the father at the time of the child's birth (*c*).
- (2) In the case of an illegitimate (*d*), or posthumous (*e*), or legitimated child, the domicil of origin is the domicil of his mother at the time of his birth.
- (3) In the case of a foundling, the domicil of origin is the country where he is born or found (*f*).

Comment and Illustrations.

Every person is held by an absolute rule, or fiction, of law to be at birth domiciled, or to have his legal home, in the country in which, at the time of the infant's birth, the person (in most cases the infant's father) on whom the infant is legally dependent is then domiciled.

As to this domicil of origin, the following points require notice:

First. The existence of a "domicil of origin" must be considered a fiction or assumption of law.

"The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal states

(*b*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 450, 457; *Munroe v. Douglas* (1820), 5 Madd. 379; *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341; *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Somerville v. Somerville* (1801), 5 Ves. 749 *a*, 786, 787; 5 R. R. 155; *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216; Story, s. 46; Westlake (5th ed.), ss. 244—252; Phillimore, ss. 67—69, 211—228; Savigny, ss. 353, 354, pp. 97—109.

(*c*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817; *Goulden v. Goulden*, [1892] P. 240.

(*d*) *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357; Westlake, ss. 246, 247.

(*e*) See Westlake (1st ed.), p. 35, and compare Jacobs, *Law of Domicil*, s. 105.

(*f*) Westlake (5th ed.), s. 248.

“or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his political *status*; another, by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil *status* or condition of the individual, and may be quite different from his political *status*. The political *status* may depend on different laws in different countries; whereas the civil *status* is governed universally by one single principle, namely, that of domicile, which is the criterion established by law for the purpose of determining civil *status*. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend. International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilised nations. It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother, if illegitimate” (g).

The aim of the fiction which assigns to every one from the moment of his birth a domicile of origin is to insure that no man shall be at any moment without a legal home (*h*) in some country, according to the laws of which country his legal rights may be, in many respects, determined; but the rule that a child has from the moment of his birth the domicile of his father is clearly based upon fact, since an infant's home is, generally speaking, the home of his father.

Secondly. The domicile of origin, though received at birth, need not be either the country in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance. “I speak,” says an eminent judge, “of the domicile of origin rather than of birth. I

(g) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury. It should be noticed that the opinion of foreign jurists and (to a certain extent) the enactments of foreign codes tend to do away with the distinction between domicile and nationality by making a person's civil, no less than his political, rights depend not on his domicile but on his nationality or allegiance. See, especially, Codice Civile del Regno d' Italia, Art. 6.

(h) See for cases of homelessness in fact, p. 88, *ante*.

“find no authority which gives, for the purpose of succession, any effect to the place of birth. If the son of an Englishman is born upon a journey, his domicile will follow that of his father. The domicile of origin is that arising from a man’s birth and connections” (*i*); *i.e.*, it is fixed by the domicile of the parent at the time of the child’s birth. Thus *D*, the son of an Englishman and a British subject, is born in France, where his father is residing for the moment though domiciled without being naturalised in America. *D*’s domicile of origin is neither English nor French, but American.

(1) *Case of a Legitimate Child*.—A legitimate child born during his father’s lifetime has his domicile of origin in the country where the infant’s father is domiciled at the moment of the child’s birth, for “the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate” (*k*).

A legitimate child, for example, is born at Boulogne at a moment when his father is domiciled in Scotland. The child’s domicile of origin is Scottish.

(2) *Case of Illegitimate (l) or Posthumous (m) Child*.—Such a child has for his domicile of origin the domicile of his mother at the time of his birth.

D is an illegitimate child born in France at a time when his father, an Englishman, is domiciled in England, and his mother, a Frenchwoman, is domiciled in France. *D*’s domicile of origin is not English but French (*n*).

D is a posthumous child, whose father was domiciled at the time of death in England. At the time of *D*’s birth his mother has acquired a domicile in France. *D*’s domicile of origin is French (*o*).

(3) *Case of a Foundling*.—*D* is a foundling, *i.e.*, a child whose parents are unknown. He is found in Scotland. His domicile of origin is Scottish (*p*).

(4) *Case of a Legitimated Child*.—A child born illegitimate, but afterwards legitimated, *e.g.*, by the subsequent intermarriage

(*i*) *Somerville v. Somerville* (1801), 5 Vesey, 749 *a*, 786, 787, per Arden, M. R.

(*k*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury.

(*l*) Westlake (5th ed.), s. 246.

(*m*) Westlake (1st ed.), p. 35; (5th ed.), s. 245.

(*n*) *Re Wright’s Trusts* (1856), 25 L. J. Ch. 621; 2 K. & J. 595.

(*o*) Westlake (1st ed.), p. 35.

(*p*) This is really rather a result of rules of evidence than a direct rule of law. See Rules 12 and 13, pp. 139, 140, *post*.

of its parents (*q*), takes the domicile of his father at and from the time of such legitimation. His domicile of origin remains apparently the country where his mother was domiciled at the time of his birth (*r*).

D is the child of a Scottish father and an Englishwoman, who are unmarried at the time of his birth. At that moment the domicile of his father is Scottish and of his mother English. A year or two afterwards, whilst his father is still domiciled in Scotland, *D*'s parents marry. *D*'s domicile of origin probably remains English, though it may possibly become Scottish. His actual domicile certainly becomes Scottish, and during minority changes with the domicile of his father (*s*).

Domicil of Choice.

RULE 7.—Every independent person can acquire a domicile of choice, by the combination of residence (*factum*), and intention of permanent or indefinite residence (*animus manendi*), but not otherwise (*t*).

Comment and Illustrations.

It will be convenient to consider separately the meaning of, and the authorities for, first, the affirmative, secondly, the negative portion of this Rule.

(*q*) See as to *legitimation per subsequens matrimonium*, Rule 146, *post*; *Moffett v. Moffett*, [1920] 1 Ir. R. (C. A.) 57.

(*r*) This seems to be Westlake's opinion as expressed in his 1st ed., p. 35; compare his 5th ed., ss. 246—248, 261, and for the point of substance involved, see p. 104, n. (*r*), *ante*.

(*s*) Compare *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357. See Rule 9, Sub-Rule 1, clause 1, p. 127, *post*. *Vaucher v. Solicitor to Treasury, In re Grove* (1888), 40 Ch. D. (C. A.) 216.

(*t*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, 458; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 450; *Collier v. Rivaz* (1841), 2 Curt. 855; *Maltass v. Maltass* (1844), 1 Rob. Ecc. 67, 73; *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341; *Haldane v. Eokford* (1869), L. R. 8 Eq. 631; *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13; *Jopp v. Wood* (1865), 34 L. J. Ch. 212; 4 De G. J. & S. 616, 621, 622; *Moorhouse v. Lord* (1863), 10 H. L. C. 272; 32 L. J. Ch. 295; *Huntly v. Gaskell*, [1906] A. C. 56; *Lord Advocate v. Brown's Trustees*, [1907] S. C. 333; *Casdagli v. Casdagli*, [1919] A. C. 145; Story, s. 44; Westlake, ss. 257—264; Phillimore, ss. 203—210.

(i) *Mode of acquisition.*

Acquisition by residence and intention of residence.—Every person begins life as a minor, and therefore as a dependent person. When he becomes an independent person (which can in no case happen before he attains his majority) (*u*), he will find himself in possession of a domicile (*x*), which will in most cases be his domicile of origin (*y*), but may be a domicile acquired by the act of the person on whom he is dependent during infancy.

He can then obtain or retain for himself by his own act and will a legal home, or domicile different from the domicile of origin, and called a domicile of choice. This domicile is acquired by the combination of residence, and the intention to reside, in a given country.

"It may," it has been said, "be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention will establish a domicile" (*z*). The process by which this new domicile is acquired has been thus aptly described. "A change of [the domicile of origin] can only be effected *animo et facto*—that is to say, by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. [A person] in making this change does an act which is more nearly designated by the word 'settling,' than by any one word in our language. Thus we speak of a colonist settling in Canada, or Australia, or of a Scotsman settling in England, and the word

(*u*) It may happen later, *e.g.*, in the case of a woman who marries while a minor, and becomes a widow late in life. The age of majority is fixed by English law at 21. By other laws, at other periods, *e.g.*, at one time by Prussian law at 25. A question may arise, as to which no English decision exists, whether a Prussian of 22 will be considered by the English Courts as capable of acquiring a domicile at the age of 21. It may be conjectured that the answer to this inquiry depends, in part at least, on the law of the country where he acquires a domicile. He might be held capable of acquiring an English domicile. A question may also arise as to the domicile of an infant widow. Most probably it is the domicile of her deceased husband at the time of his death. In the case of an infant whose marriage is annulled, presumably her domicile is that which she had before her marriage; compare Rule 65, p. 300, *post*.

(*x*) See Rules 9 and 11, pp. 126 and 137, *post*.

(*y*) If it is not, it becomes immediately his domicile of choice by the process of acquisition described in the text. See p. 104, n. (*r*), *ante*.

(*z*) *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Cranworth. Minor remarks (s. 60, note 4) that physical presence in a country, combined with the proper intention, is enough to constitute domicile, and that the word "habitual" is unnecessary. See especially *Lowrie v. Bradley*, 39 Am. Dec. 142, 144.

"is frequently used as expressive of the act of change of domicile, "in the various judgments pronounced by our Courts" (a). The acquisition, in short, of a domicile of choice is nothing more than the technical expression for settling in a new home or country, and therefore involves the existence of precisely those conditions of act and intention which we have seen to be requisite for the acquisition of a home (b).

"The only principle which can be laid down as governing all "questions of domicile is this, that where a party is alleged to have "abandoned his domicile of origin, and to have acquired a new "one, it is necessary to show that there was both the *factum* "and the *animus*. There must be the act, and there must be the "intention" (c).

"A new domicile is not acquired until there is not only a fixed "intention of establishing a permanent residence in some other "country, but until also this intention has been carried out by "actual residence there" (d).

(a) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 449, per Lord Chelmsford.

(b) It may, therefore, be thought that the term "domicil of choice" is exactly equivalent to the ordinary expression "home," as already defined (see p. 85, *ante*), but this is not the case. A domicile of choice is always a home, but a home is not always a domicile of choice. For the domicile of origin, being imposed by a rule of law, is never considered as a domicile of choice; though as a matter of fact a person's domicile of origin is, in most instances, a person's actual home. So, again, a person's real home may not, in the eye of the law, be his domicile of choice, since he may be a person who, though in fact capable of choosing a home for himself, is legally incapable of such choice. Thus, minors or married women often do choose homes for themselves, but as they are considered by law incapable of such choice, the home they have in fact chosen is not legally their domicile of choice.

Though, again, the legal conditions necessary for the acquisition of a domicile of choice are, in substance, the same as the conditions necessary for the acquisition of a home, these conditions are, for legal purposes, defined with technical precision. The legal theory, further, that every one has a domicile of origin, which is, so to speak, presumably his home, leads to the result that the law requires stronger proof of deliberate intention to acquire a new domicile than would be demanded by any person who, without reference to legal rules, wished to determine whether *D* had or had not left England and settled in Australia; and generally the Courts, in judging whether a man has acquired a domicile of choice, look more to intention, and less to length of residence, than would popular judgment in inquiring whether he had acquired a new home. Thus, it can hardly be doubted either that the decision in *Bell v. Kennedy* (L. R. 1 Sc. App. 307) is legally correct or that it is opposed to ordinary notions. A layman would probably have held that Mr. Bell had settled in Scotland.

(c) *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 731, per Kindersley, V.-C.

(d) *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Chelmsford.

It is, in short, admitted in general terms that "the question of domicile is a question of fact and intention" (e).

Particular attention, therefore, is due to the nature both of the requisite fact, viz., "residence," and of the requisite "intention."

(i) *Residence*.—The nature of residence considered as a part of domicile, and thus looked at as a physical fact, independently of the *animus manendi*, has been little discussed (f). It may be defined (as already suggested) as "habitual physical presence in a place or country." The word "habitual," however, must not mislead. What is meant is not presence in a place or country for a length of time, but presence there for the greater part of the time, be it long or short, which the person using the term "residence" contemplates.

The residence which goes to constitute domicile certainly need not be long in point of time. "If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile" (g).

The residence must, however, be in pursuance of, or influenced by, the intention. Mere length of residence will not of itself constitute domicile. *D*, a Scotsman, born in Scotland, never leaves England during the last twenty-two years of his life. *D*, however, has never exhibited the intention of settling in England. *D*, therefore, at death retains his Scottish domicile (h), though he has not visited it for seventy-two years.

This characteristic, however, in common with other qualities which are generally ascribed to residence, concerns not the physical fact of residence, but the mental fact of the choice, purpose, or intention to reside (*animus manendi*).

(ii) *Intention*.—The main problem in determining the nature of domicile (i), in so far as it depends upon choice, consists in

(e) *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391, 393, per Wilde, B. See also *Collier v. Rivaz* (1841), 2 Curt. 855; *Maltass v. Maltass* (1844), 1 Rob. Eccl. Rep. 67.

(f) It may be well to note again that residence is often used as including the *animus manendi*, and hence as equivalent to home or domicile. See, e.g., *King v. Foxwell* (1876), 3 Ch. D. 518, 520, for expressions of Jessel, M. R., as to residence, where the term is probably used as including the *animus manendi*. See p. 86, note (l), ante. For the difference between residence and domicile, see *Walcot v. Botfield* (1854), Kay, 534, 543, 544.

(g) *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 319, per Lord Cranworth.

(h) *In re Patience* (1885), 29 Ch. D. 976. Conf. *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

(i) See App., Note 6, "Definition of Domicil."

defining the character of the necessary intention or *animus*. The difficulty lies partly in the nature of the thing itself, partly in the different views which Courts and writers have at different times entertained, as to the nature and definiteness of the requisite intention or purpose. The best definition or description of the requisite *animus* appears to be, "the present intention of permanent or "indefinite residence in a given country," or (if the same thing be expressed more accurately, in a negative form) "the absence of "any present intention of not residing permanently or indefinitely "in a given country" (*k*).

There exists no authoritative definition of the *animus manendi* necessary to the acquisition of a domicile of choice, but there are four points as to its character which deserve notice.

First. The intention must amount to a purpose or choice.

The "domicil of choice is a conclusion or inference which the "law derives from the fact of a man fixing voluntarily his sole or "chief residence in a particular place" (*l*). It must not be "prescribed or dictated by any external necessity" (*m*). "In order "that a man may change his domicil of origin he must choose "a new domicil—the word 'choose' indicates that the act is "voluntary on his part; he must choose a new domicil by fixing "his sole or principal residence in a new country (that is, a country "which is not his country of origin), with the intention of "residing there for a period not limited as to time" (*n*).

The expression that the residence must be "voluntary," or a matter of choice, is not in itself a happy one (*o*) since, supposing a person to make up his mind to settle in a country for an indefinite time, the "motive," whether it be economy, pleasure, or even considerations of health (*p*), is indifferent, though certainly the resi-

(*k*) For the substance of this description, see Story, s. 43; and compare the language of Cairns, C., in *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307, 318. See also judgment of Martin, B., *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391, 395, 396.

(*l*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

(*m*) *Ibid.*

(*n*) *King v. Foxwell* (1876), 3 Ch. D. 518, 520, per Jessel, M. R. Conf. *Briggs v. Briggs* (1880), 5 P. D. 163.

(*o*) The words "voluntary" or "voluntarily" may easily mislead. Conf. *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357; *In re Marrett* (1887), 36 Ch. D. (C. A.) 400, especially judgment of Cotton, L. J., p. 407; *D'Etchegoyen v. D'Etchegoyen* (1888), 13 P. D. 132, 136, per Hannen, Pres.

(*p*) See *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13, compared with the expressions of Lord Westbury in *Udny v. Udny* (1869),

dence would not in some of these cases be termed, in ordinary language, a matter of choice. What, however, is intended to be expressed, and is undoubtedly true, is that the residence must be connected with the distinct purpose, or intention, to reside. In this sense, therefore, there must be a residence of "choice." The mere fact, in other words, of residence, however prolonged, has no effect on the acquisition of domicile, unless the residence is in consequence of an intention to reside. Hence,—to take a familiar example,—residence in a country, arising from sudden illness, as when *D*, domiciled in England, falls ill on a journey through France, and is delayed there from week to week, does not entail a change of domicile.

How far this intention or choice must be distinct or conscious is still an open question.

Some judges have held that it is not necessary, in order to establish a domicile, that a person should have absolutely made up his mind which of two countries is the place where he intends to make his permanent home.

"One word," says Bramwell, B., "with regard to the intention. '[The counsel for the defendant] says, and I think he errs there, that [*D*] did not intend to remain in England, because he contemplated that he might possibly go back to India. I think there is a very common mistake made in such cases, which is the assumption that a man must absolutely intend one of two things, for it may be that he has no absolute intention of doing either. It may be that [*D*] did not contemplate the case at all arising of an opportunity of going back to India. So that, if he had been suddenly appealed to upon the subject, he might have said, 'I have never thought of it.' I think, however, it appears here that he had contemplated the possibility of returning to India. But is it to be said that a contingent intention of that kind defeats the intention which is necessary to accompany the *factum*, in order to establish a domicile? Most assuredly not. There is not a man who has not contingent intentions to do something that would be very much to his benefit if the occasion arises. But if every such intention or expression of intention prevented a man

L. R. 1 So. App. 441, 458, which seem to imply that a domicile of choice must not be dictated by a desire for "relief from illness." See, as to domicile of invalids when abroad, comment on Rule 18, *post*. A person may change his domicile, though his object in doing so is to defeat his creditors (*In re Robertson*, [1885] W. N. 217), or to evade the jurisdiction of the English Courts (*Drexel v. Drexel*, [1916] 1 Ch. 251, 259).

"having a fixed domicile, no man would ever have a domicile at all, except his domicile of origin" (q).

Others have laid down that a somewhat more distinct intention must exist. "It must," it has been said, "be shown that the intention required actually existed, or made reasonably certain that it would have been formed or expressed if the question [whether a person intended to change his domicile] had arisen in a form requiring a deliberate or solemn determination" (r).

The difference of view, however, is not, after all, great. The question about the degree of definiteness of purpose which is needed refers rather to the evidence than to the nature of the intention.

Secondly. The intention must be an intention to reside permanently, or for an indefinite period (s).

It must be, that is to say, not an intention to reside for a limited time or definite purpose, but "an intention of continuing to reside for an unlimited time" (t).

If, for example, *D*, domiciled in England, goes to America for six months, or to finish a piece of business, or even with the intention of staying there only until he has made a fortune (u), he retains his English domicile. Thus, a residence in a foreign

(q) *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284, 292, per Bramwell, B.

(r) *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 645, per Wickens, V.-C.

(s) It is maintained by a Scottish writer (Fraser, Husband and Wife (2nd ed.), p. 1265) that a person cannot change his domicile unless he has the intention to change his civil status; conf. *Donaldson v. McClure* (1857), 20 D. 307, 321; *Steel v. Steel* (1888), 15 R. 896; *Huntly v. Gaskell*, [1906] A. C. 56, 66, per Lord Halsbury; *James v. James* (1908), 98 L. T. 438. This contention is, however, according to English law, erroneous, for it is clear that if *D* leaves England for good and takes up his residence in France with the intention of residing there permanently, he will, by our Courts, be held to have acquired a French domicile, and this, even though he may wish to retain his status as an English citizen; nor is it easy to see how, on any view, a change of domicile can be made to depend on the intention to change a person's civil status. Most people, on leaving one country to reside in another, do not, in fact, either contemplate or understand the effect of such residence on their civil status. The doctrine, in short, that a change of domicile cannot be effected without the intention to make a change of status, appears to be only a slightly different form of the doctrine deliberately rejected by the House of Lords, that a person cannot change his domicile unless he intends *quatenus in illo exuere patriam*.

(t) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury; *The Lauderdale Peerage Case* (1885), 10 App. Cas. 692.

(u) *Jopp v. Wood* (1864), 34 L. J. Ch. 212; 4 De G. J. & S. 616. See, however, *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441; *Davis v. Adair*, [1895] 1 Ir. R. (C. A.) 379, 400, per Porter, M. R.; *Moffett v. Moffett*, [1920] 1 Ir. R. (C. A.) 57.

country for twenty-five years (*x*) will not change a person's domicil in default of the intention of settling permanently or indefinitely in such foreign country; but it is, of course, "true that "residence originally temporary, or intended for a limited period, "may afterwards become general and unlimited, and in such a "case, as soon as the change of purpose, or *animus manendi*, can "be inferred, the fact of domicil is established" (*y*). If *D*, who goes to America, intending to stay there for a limited period, after living there for a year or two, makes up his mind to reside there permanently, he at once acquires an American domicil.

Thirdly. The intention must be an intention of abandoning, i.e., of ceasing to reside permanently in, the former domicil.

"The intention must be to leave the place where the party has "acquired a domicil, and to go to reside in some other place as the "new place of domicil, or the place of new domicil" (*z*). Indeed, if it be granted that a man can have but one domicil at the same time (*a*), it necessarily follows that the purpose, or *animus*, requisite for acquiring a domicil in France must exclude the purpose requisite for retaining a domicil in England.

Fourthly. The intention need not be an intention to change allegiance (b).

The intention to reside permanently or settle (*c*) in a country is not the same thing as the intention or wish to become a citizen of that country.

It was, indeed, at one time held that a man could not change his domicil, for example, from England to the United States, without doing at any rate as much as he could to become an American citizen. He must, as it was said, "intend *quatenus "in illo exuere patriam*" (*d*). But this doctrine has now been

(*x*) *Jopp v. Wood* (1864), 34 L. J. Ch. 212; 4 De G. J. & S. 616. See, however, *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441; *Davis v. Adair*, [1895] 1 Ir. R. (C. A.) 379, 400, per Porter, M. R.; *Moffett v. Moffett*, [1920] 1 Ir. R. (C. A.) 57.

(*y*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

(*z*) *Lyall v. Paton* (1856), 25 L. J. Ch. 746, 749, per Kindersley, V.-C.

(*a*) See Rule 3, p. 99, *ante*.

(*b*) See, however, p. 107, note (*g*), *ante*.

(*c*) See *Winans v. Attorney-General*, [1904] A. C. 287, 299, 300, judgment of Lord Lindley; in *Huntly v. Gaskell*, [1906] A. C. 56, the judgment of Halsbury, Ch., shows a tendency to revert towards the doctrine of *Moorhouse v. Lord* (1863), 10 H. L. C. 272. But see *Casdagli v. Casdagli*, [1919] A. C. 145, 171, 172, per Lord Haldane; 178, per Lord Atkinson; 201, per Lord Phillimore; *James v. Barry*, *The Times*, April 29, 1921.

(*d*) *Moorhouse v. Lord* (1863), 32 L. J. Ch. 295, 298; 10 H. L. C. 272, 283,

pronounced erroneous by the highest authority (*e*); and when an Englishman leaves England, where he is domiciled, and goes to the United States, he changes his domicile if he intends to settle in the new country and to establish his principal or sole and permanent home there, even though the legal consequences of his so doing may never have entered his mind (*f*); and though he may have had no intention of becoming an American citizen, and has remained a British subject to the end of his life (*g*).

(ii) *No other mode of acquisition.*

The concurrence of residence and intention, for however short a time, is essential for the acquisition of a domicile.

"We are all agreed," it has been said, "that to constitute a domicile, there must be the fact of residence . . . and also a purpose on the part of [*D*] to have continued that residence. While I say that both must concur, I say it with equal confidence that nothing else is necessary" (*h*).

"Residence" alone clearly will not suffice.

This is sufficiently apparent from the ordinary case of persons travelling, or living abroad, who retain a domicile in a country they may not have seen for years (*i*).

"Intention" alone will not suffice.

D, who has never resided in Australia, will clearly not acquire a domicile there by the mere intention to reside there.

Nor will the fact that *D* has set forth from England on his voyage to Australia give him an Australian domicile until he arrives there (*k*).

per Lord Cranworth, followed by *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985; *Ir re Grove, Vaucher v. Solicitor to the Treasury* (1888), 40 Ch. D. (C. A.) 216. Compare, however, Westlake (5th ed.), ss. 254—256, especially pp. 361, 362.

(*e*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Brunel v. Brunel* (1871), L. R. 12 Eq. 298.

(*f*) See especially *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 643, 644, judgment of Wickens, V.-C.

(*g*) *Brunel v. Brunel* (1871), L. R. 12 Eq. 298; *Winans v. Attorney-General*, [1904] A. C. 287.

(*h*) *Arnott v. Groom* (1846), 9 D. 142, 149—152, per Lord Jeffrey. Compare *Collier v. Rivaz* (1841), 2 Curt. 855, 857, per Sir H. Jenner. See also *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 450.

(*i*) See further for cases where there is no change of domicile, because there is residence without the *animus manendi*, comment on Rule 18, p. 147, *post*.

(*k*) Westlake holds that if in this case England were *D*'s domicile of choice, the leaving England with the intention of permanent residence in Australia would

This must be noticed, because it was at one time thought (*l*) that a new domicile could be acquired *in itinere*, i.e., that if *D* left England, intending to settle, e.g., in Australia, he acquired an Australian domicile the moment he quitted England (*m*). But this notion is apparently erroneous, and the principle may probably be taken as established, that a domicile of choice can be acquired by nothing short of the concurrence of residence and intention.

From the fact that the acquisition of a domicile of choice depends solely on the co-existence of residence and intention to reside, two important results may be deduced.

First. A person's wish to retain a domicile in one country will not enable him to retain it if, in fact, he resides with the *animus manendi* in another.

D, an Englishman, originally domiciled in England, resided at Hamburg with the intention of living there for an indefinite period. He wished, however, to retain his English domicile, and coming for a temporary purpose to England, made a will there, in which he declared his intention not to renounce his English domicile of origin. He then returned to Hamburg, and continued living there with the *animus manendi* till his death. *D* had at the time of his death a domicile at Hamburg and not in England (*n*).

"I consider," says Pollock, C. B., "the declaration of the testator as meaning that he intended to go back to Hamburg to live and die there, though it was not his intention of never coming to England again. Probably he wished for two domicils. But in spite of a lurking desire to return to England, his acts show an intention to live and die at Hamburg, and that is not affected by the declaration. . . . That being so, he *could not help giving up* his English domicile" (*o*). "The testator," adds Bramwell, B., "does not say that he had no intention of remaining at Hamburg during his life, but only that *he wished to retain his English domicile. That he could not do*" (*p*).

suffice to give *D* an Australian domicile before he arrived in Australia. Westlake, ss. 259, 260. But this view overlooks the express disapproval of this doctrine by Kindersley, V.-C., in *Lyall v. Paton* (1856), 25 L. J. Ch. 746.

(*l*) See expressions of Leach, V.-C., in *Munroe v. Douglas* (1820), 5 Madd. 379, 405.

(*m*) See further, Rule 8, p. 121, *post*.

(*n*) *Re Steer* (1858), 3 H. & N. 594; 28 L. J. Ex. 22.

(*o*) *Re Steer* (1858), 3 H. & N. p. 599.

(*p*) *Ibid*.

Secondly. The acquisition of a domicile cannot be affected by rules of foreign law (q).

By the law of some countries, *e.g.*, of France, a person is required to fulfil certain legal requirements before he is considered by the French Courts to be at any rate fully domiciled in France, but if a person in fact resides with the *animus manendi* in France (*i.e.*, is really settled in France), he will be considered by our Courts to be domiciled there, even though he has not complied with the requirements of French law.

D, an English peer, lives in France, and as a matter of fact intends to pass the rest of his life in France. He wishes, however, to retain a domicile in England. He occasionally exercises political rights there, and always describes England in formal documents as his domicile. He has not fulfilled the legal requirements of French law already referred to. *D* is domiciled in France (*r*).

We must, however, carefully distinguish any question as to the *acquisition* or possession by *D* of a domicile in a particular country, *e.g.*, France, from the different question of the legal *effect* of *D* having acquired, or possessing a domicile in France. The first question must be answered by an English Court in accordance with the rules of English law with regard to the nature, the acquisition, and the change of domicile (*i.e.*, the Rules laid down in this chapter), and must be answered without reference to the law of France. This is distinctly laid down in a case where the question arose, whether a Frenchwoman who, before her marriage, and while domiciled in France had made a will leaving her movables to her sister, did or did not acquire an English domicile on her marriage with a Frenchman residing in London.

"The domicile of the testatrix must be determined by the English Court of Probate according to those legal principles applicable to domicile which are recognised in this country and are part of its law. Until the question of the domicile of the testatrix at the time of her death is determined, the Court of Probate cannot tell what law of what country has to be applied. The testatrix was a Frenchwoman, but it would be contrary to sound principle to determine her domicile at her death by the

(q) *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211; contrast *In re Bowes* (1906), 22 T. L. R. 711.

(r) *Hamilton v. Dallas* (1875), 1 Ch. D. 257; compare *Anderson v. Laneville* (1854), 9 Moore, P. C. 325; *Bremer v. Freeman* (1857), 10 Moore, P. C. 306, 373, 374; *Collier v. Rivaz* (1841), 2 Curt. 855 (domicil in Belgium).

"evidence of French legal experts. The preliminary question, "by what law is the will to be governed, must depend in an English Court on the view that Court takes of the domicile of the testatrix when she died. If authority for these statements is wanted, it will be found in *Bremer v. Freeman* (*s*), *Doglioni v. Crispin* (*t*), and *In re Trufort* (*u*). In each of the last two cases a foreign Court had determined the domicile, and the English Court had also to determine it, and did determine it to be the same as that determined by the foreign Court. But, as I understand those cases, the English Court satisfied itself as to the domicile in the English sense of the term, and did not simply adopt the foreign decisions. The course universally followed when domicile has to be decided by the Courts of this country proceeds upon the principles to which I have alluded" (*x*).

The second question, when it has been found by the English Court that *D* has acquired or possesses a domicile, in the English sense of that term, must be answered solely with regard to the law of France, and this without any reference to the legal effect of domicile under the law of England (*y*).

In the case already mentioned (*z*), it was found by the Court that the testatrix became on her marriage domiciled in England, and hence that her will was, in accordance with English law, revoked by the marriage. If it had been found that the testatrix on her marriage retained her French domicile, then the effect of the marriage would have been determined in accordance with French law (*lex domicilii*) (*a*).

(*s*) (1857), 10 Moore, P. C. 306.

(*t*) (1866), L. R. 1 H. L. 301.

(*u*) (1887), 36 Ch. D. 600.

(*x*) *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 227, Lindley, L. J. But contrast *In re Johnson*, [1903] 1 Ch. 821; *In re Bowes* (1906), 22 T. L. R. 711; and App., Note 1, "Law of a Country and the *Renvoi*."

(*y*) This is apparently the meaning of Westlake's statement: "If an establishment be made in any country in such manner that by English law it would fix the domicile there, still no effect which the law of that country does not allow to it can be allowed to it in the character of domicile in England. In other words, no one can acquire a personal law in the teeth of that law itself." Westlake (5th ed.), s. 254. See for the meaning of the term "law of a country," Intro., pp. 6, 7, *ante*, and also chap. i., p. 79, *ante*. *Bremer v. Freeman* (1857), 10 Moore, P. C. 306; *Collier v. Rivaz* (1841), 2 Curt. 855; *Hamilton v. Dallas* (1875), 1 Ch. D. 257; compare *In re Johnson*, [1903] 1 Ch. 821, 832—835.

(*z*) *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211.

(*a*) *I.e.*, it would have been held that the will was not revoked.

Change of Domicil.

RULE 8 (b).

- (1) The domicil of origin is retained until a domicil of choice is in fact acquired.
- (2) A domicil of choice is retained until it is abandoned, whereupon either
 - (i) a new domicil of choice is acquired; or
 - (ii) the domicil of origin is resumed.

Comment and Illustrations.

An independent person (*c*) retains a domicil in a country where he has once acquired it until he has (in the strict sense of the term "abandonment") abandoned (*d*) that country by giving up, not only his residence there but also his intention to reside there, or, to use untechnical language, until he has left the country for good. But, though a domicil is never changed without actual abandonment of an existing domicil, the legal effect of a man's having left a country where he is domiciled for good differs according as the domicil is a domicil of origin or a domicil of choice.

(1) *Domicil of origin.—How changed.*—"Every man's domicil of origin must be presumed to continue, until he has acquired another sole domicil by actual residence, with the intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies on the party who asserts that change" (*e*). "It is a clear principle of law, that the domicil of origin continues until another domicil is acquired, *i.e.*, till the person whose domicil is in question has made a new home for himself in lieu of the home of his birth" (*f*).

The meaning of these expressions is that a domicil of origin cannot be simply abandoned. If *D* is in possession of an English domicil of origin, he may indeed in fact abandon England as his

(*b*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307. It requires stronger evidence to establish the intention to abandon a domicil of origin than the intention to abandon a domicil of choice. *Winans v. Attorney-General*, [1904] A. C. 287, and *Huntly v. Gaskell*, [1906] A. C. 56.

(*c*) For meaning of term "independent person," see p. 73, *ante*.

(*d*) See p. 87, *ante*.

(*e*) *Aikman v. Aikman* (1861), 3 Macq. 854, 877, per Lord Wensleydale.

(*f*) *Ibid.* p. 863, per Lord Cranworth.

home without in reality settling elsewhere, but, in the eye of the law, he cannot give up or get rid of his domicile of origin until he has in fact changed it for another by settling in another country. Though in reality homeless, he will, until he settles elsewhere, be considered to have his legal home or domicile in England.

D, the descendant of a Scottish family, had a domicile of origin in Jamaica. In 1837, after he came of age, he sold his estates in Jamaica and left the island, to use his own expression, for good. He then went to Scotland, and was resident there during 1838, but without making up his mind whether to settle in Scotland or not. The question came before the Courts whether on the 28th September, 1838, *D* was or was not domiciled in Scotland. The Court of Session held that he had then acquired a Scottish domicile. But the House of Lords, reversing the decision of the Court of Session, held that *D* still remained domiciled in Jamaica.

Their decision was based on the ground that though *D* was on the 28th September, 1838, resident in Scotland, he had not at that moment any fixed or settled purpose to make Scotland his future home; that, in short, he was resident in Scotland, but without the *animus manendi*, and therefore had not acquired a Scottish domicile, but still retained his domicile of origin, *i.e.*, was domiciled in Jamaica (*g*).

(2) *Domicil of choice*.—*How changed*.—A domicile of choice or a home is retained (*h*) until both residence (*factum*) and intention to reside (*animus*) are in fact given up, but when once both of these conditions have ceased to exist, it is abandoned as well in law as in fact.

Of the principle that a domicile of choice is retained until actual abandonment, the following case affords a good illustration:

D, a widow, whose domicile of origin was English, acquired by marriage a domicile in France. After her husband's death she determined to return to England as her home. She went on board an English steamer at Calais, but was seized with illness, *and before the vessel left the harbour*, re-landed in France, where after some months (though wishing to return to England) she died, having been unable on account of ill-health to leave France. *D* retained her French domicile. "I cannot think," it was laid down, "that there was a sufficient act of abandonment, so long

(*g*) *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307; see especially, judgment of Lord Westbury, pp. 320, 321, 322.

(*h*) See pp. 89—91, *ante*.

“as the deceased remained within the territory of France, her “acquired domicile” (i).

The case is an extreme one, but was clearly well decided; it exactly illustrates the principle that a domicile of choice is retained until actual residence in a country is brought to an end. So, again, *D*, an Englishman, who had acquired a domicile of choice in Germany, returned for a time to England, but retained the intention to reside permanently in Germany. He did not lose his German domicile (*k*). This case illustrates the principle that a domicile once acquired is retained until the intention to reside is brought to an end. To use, in short, technical language, the domicile of choice is retained, either *facto* or *animo* (*l*).

The principle, on the other hand, that actual abandonment of such a domicile puts an end to its existence, not only in fact, but in law, has been judicially stated in the following terms:

“It seems reasonable to say, that if the choice of a new abode “and actual settlement there constitute a change of the original “domicil, then the exact converse of such a procedure, viz., the “intention to abandon the new domicil, and an actual abandon- “ment of it, ought to be equally effective to destroy the new “domicil. That which may be acquired may surely be aban- “doned” (*m*).

(i) *Acquisition of new domicile of choice*.—The abandonment of one domicile of choice may, as a matter of fact, coincide with the acquisition of another (*n*). *D*, for example, whose domicile of origin is English, has acquired a domicile of choice in France. He goes to Germany, intending to reside there for a short time, and, therefore, on arriving in Germany, still retains his French domicile of choice. But after residing in Germany for some time, he makes up his mind to reside there permanently; at that moment,

(i) *In Goods of Raffeneil* (1863), 32 L. J. P. & M. 203, 204, per Sir C. Cresswell.

(*k*) *Re Steer* (1858), 28 L. J. Ex. 22; 3 H. & N. 594.

(*l*) But it is not sufficient for the abandonment of a domicile of choice that a man should be simply dissatisfied with it and intend to leave it. “If a man “loses his domicile of choice, then, without anything more, his domicile of origin “revives; but in my opinion, in order to lose the domicile of choice once acquired, “it is not only necessary that a man should be dissatisfied with his domicile of “choice, and form an intention to leave it, but he must have left it, with the “intention of leaving it permanently. Unless he has done that, unless he has “left it both *animo et facto*, the domicile of choice remains.” *In re Marrett* (1887), 36 Ch. D. (C. A.) 400, 407, judgment of Cotton, L. J.

(*m*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 450, per Hatherley, C.

(*n*) See p. 89, *ante*.

both his French domicile of choice is abandoned, and a German domicile of choice is acquired.

So far there is no difference between a domicile of origin and a domicile of choice; either may be abandoned simultaneously with the actual acquisition of another domicile.

(ii) *Resumption of domicile of origin*.—A person in possession of a domicile of choice may abandon it, and at the same moment, in actual fact, resume his domicile of origin. This case presents no peculiarity, and is, in its essential features, exactly like the case already considered, of *D*'s in fact abandoning one domicile of choice simultaneously with the acquisition of another.

But another state of circumstances is possible. A person may, as a matter of fact, abandon a home or domicile of choice in one country without in fact acquiring a home in another (*o*).

D, for example, whose domicile of origin is English, has an acquired home or domicile of choice in France. He leaves France for good, without any intention of returning to England, or of settling in any country whatever. He is in fact homeless. As, however, no one can in the eye of the law be without a domicile (*p*), it is a matter of logical necessity that, in order to give *D* a domicile, one of two fictions should be adopted.

It might, in the first place, be held, that in the case of an acquired, as of an original domicile, any existing domicile was retained until another was actually acquired; or, to take *D*'s particular case, that *D* retained his French domicile, until he in fact settled in some other country. This view, however, which was at one time adopted by our Courts, is now rejected (*q*).

It might, in the second place, be held that on the simple abandonment of a domicile of choice, the domicile of origin is by a rule of law at once resumed or re-acquired, and this is the view now adopted by English tribunals.

D, for example, when he leaves France for good, without any intention of settling elsewhere, immediately re-acquires his English domicile. For the true doctrine is, that the domicile of origin reverts from the moment that the domicile of choice is given up. "This is a necessary conclusion, if it be true that an acquired domicile ceases entirely whenever it is intentionally abandoned, "and that a man can never be without a domicile. The domicile of

(*o*) See pp. 88, 90, 91, *ante*.

(*p*) See Rule 2, p. 98, *ante*.

(*q*) See *Munroe v. Douglas* (1820), 5 Madd. 379.

“origin always remains, as it were, in reserve, to be resorted to in “case no other domicile is found to exist” (*r*).

Hence, whenever a person in fact abandons a domicile of choice, without actually acquiring a new domicile of choice, his domicile of origin is always resumed; for either he resumes it in fact, or if he does not do so in fact, he is assumed by a rule of law to resume or re-acquire it.

The precise difference in this matter between a domicile of origin and a domicile of choice may be seen from the following illustration:

An Englishman whose domicile of origin is English, and a Scotsman whose domicile of origin is Scottish, are both domiciled in England, where the Scotsman has acquired a domicile of choice. They leave England together, with a view to settling in America, and with the clearest intention of never returning to England. At the moment they set sail their position is in matter of fact exactly the same; they are both persons who have left their English home, without acquiring another. In matter, however, of law their position is different; the domicile of the Englishman remains English, the domicile of the Scotsman becomes Scottish. The Englishman retains his domicile of origin, the Scotsman abandons his domicile of choice, and re-acquires his domicile of origin. If they perish intestate on the voyage, the succession (*s*) to the movables of the Englishman will be determined by English law, the succession to the movables of the Scotsman will be determined by Scottish law. The Englishman will be considered to have his legal home in England, whilst the Scotsman will be considered to have his legal home in Scotland (*t*).

The distinction pointed out in Rule 8 between a domicile of origin and a domicile of choice is borne out by the decision of the House of Lords in *Udny v. Udny*. *D*'s domicile of origin was Scottish. He settled in England, and acquired there a domicile of choice; he then abandoned England as his home, and went to reside at Boulogne, without, however, intending to settle or becoming domiciled in France. It was held that under these circumstances *D* resumed his Scottish domicile of origin at the moment when he left England (*u*).

(*r*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 454, per Lord Chelmsford.

(*s*) See Rule 193, *post*.

(*t*) But see as to Westlake's dissent, p. 117, note (*k*), *ante*.

(*u*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441. This is the leading case on the change of domicile, and taken together with *Bell v. Kennedy*, L. R. 1 Sc.

Rule 8 applies only to the domicile of independent persons. An infant, for example, may lose his domicile of origin without, in fact, acquiring a home or domicile of choice in any country.

Thus *D* is the infant son of *M*, whose domicile of origin is English. At *D*'s birth, *M* is domiciled in France. *D*'s domicile of origin is therefore French (*x*). *M* leaves France for good, taking *D* with him, and intending to settle in America. During the voyage across the Atlantic, *M*'s domicile (*y*), and therefore *D*'s (*z*), is English; but *D* has never resided in England, and is, in fact, homeless. *D* therefore has changed his domicile of origin without the acquisition of a home in any country.

It is easy to work out a similar result in the case of a wife.

Domicil of Dependent Persons (Minors and Married Women) (a).

RULE 9.—The domicile of every dependent person (*b*) is the same as, and changes (if at all) with, the domicile of the person on whom he is, as regards his domicile, legally dependent (*c*).

Comment.

The general principle here stated is, that a person not *sui juris*, such as a minor or a wife, has the domicile of the person on whom he or she is considered by law to be dependent.

The words "if at all" should be noticed. They are intended to meet the position of a dependent person whose domicile cannot, at the moment, be changed at all. Such is the position of a minor without parents or guardians. He cannot change his domicile

App. 307, contains nearly the whole of the law on the subject. The judgment of Lord Westbury, pp. 458, 459, should be particularly studied.

(*x*) See Rule 6, p. 106, *ante*.

(*y*) See pp. 124, 125, *ante*.

(*z*) See Rule 9, and Sub-Rule 1, *post*.

(*a*) As to the domicile of a lunatic or idiot, see pp. 152, 153, *post*. If *D* remains after he becomes of age an idiot or lunatic, his domicile changes with that of his father. But if he becomes lunatic after he becomes of age and is sent to an asylum, he is in the position of a prisoner, and his domicile remains unchanged. See *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611.

(*b*) For meaning of "dependent person," see p. 73, *ante*.

(*c*) See especially, Westlake (5th ed.), ss. 244—253; Savigny, s. 353, Guthrie's transl. (2nd ed.), pp. 97—106. For further authorities, see notes to Sub-Rule 1, p. 127, *post*, and Sub-Rule 2, p. 134, *post*.

himself, for he is not independent. It cannot at the moment be changed for him, because there is no person in existence on whom he is legally dependent.

The operation of the Rule is seen from the resulting Sub-Rules.

SUB-RULE 1.—Subject to the exceptions hereinafter mentioned, the domicile of a minor is during minority determined as follows:—

- (1) The domicile of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicile of his father (*d*).
- (2) The domicile of an illegitimate minor, or of a minor whose father is dead, is, whilst the minor lives with his mother, the same as, and changes with, the domicile of the mother (?) (*e*).
- (3) The domicile of a minor without living parents, or of an illegitimate minor without a living mother, possibly is the same as, and changes with, the domicile of his guardian, or may be changed by his guardian (?) (*f*).

Comment and Illustrations.

(1) *Case of legitimate minor.*—A child's domicile during minority changes, while the father is alive, with the domicile of the father.

(*d*) *Somerville v. Somerville* (1801), 5 Ves. 749 *a*; 5 R. R. 155; *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611; *Forbes v. Forbes* (1854), Kay, 341; 23 L. J. Ch. 724, 726, 727; *In re Macreight* (1885), 30 Ch. D. 165; *In re Beaumont*, [1893] 3 Ch. 490; *Goulder v. Goulder*, [1892] P. 240.

(*e*) *Pottinger v. Wightman* (1817), 3 Mer. 67; 17 R. R. 20; *In re Beaumont*, [1893] 3 Ch. 490. See also the American cases, *Holyoke v. Haskins*, 5 Pick. 20; *School Directors v. James*, 2 Watts & Serg. 568; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 361; and the Scottish case, *Arnott v. Groom* (1846), 9 D. 142. See Wharton, ss. 41, 42.

(*f*) *Pottinger v. Wightman* (1817), 3 Mer. 67; 17 R. R. 20; *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 66, language of Lyndhurst, C.; 138—140, judgment of Lord Campbell; *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611, 617; *In re Beaumont*, [1893] 3 Ch. 490. But these authorities refer almost wholly to the authority of a mother to change the domicile of a child whose father is dead, and hardly determine what is the authority in that respect of a guardian. Compare especially, Westlake (5th ed.), ss. 249, 250, and see pp. 130, 131, *post*.

D is the legitimate son of a domiciled Englishman (*g*), and is himself born in England. When *D* is ten years old, his father emigrates to America and settles there. *D* is left at school in England (*h*). *D* thereupon acquires an American domicile.

D is the infant son of Scottish parents, domiciled in Scotland, who marry after *D*'s birth. *D* is thereby legitimated. His father then, while *D* is still a minor, acquires an English domicile. *D*'s domicile thereupon becomes English (*i*).

(2) *Case of minor who is illegitimate, or whose father is dead (k).*—The domicile of an illegitimate child, or of a child whose father is dead, is, during his minority, if he lives with his mother (*l*), probably the same as, and (subject to the possible effect of Exception 1) (*m*) changes with, the domicile of his mother.

D is the illegitimate son of a domiciled Englishman and a Frenchwoman, domiciled at the time of *D*'s birth in England (*n*). The mother, when *D* is five years old, goes with him to France, and resumes her original French domicile. *D* acquires a French domicile.

There was at one time a doubt whether, after the death of the father, the children, remaining under the care of the mother, followed her domicile, or, until the end of their minority, retained that which their father had at the time of his death. The case, however, of *Pottinger v. Wightman* (*o*) must now be taken conclusively to have settled the general doctrine, that (subject at any rate to the exceptions hereinafter mentioned) if, after the death of the father, an unmarried infant lives with his mother, and the mother acquires a new domicile, it is communicated to the infant (*p*).

(*g*) The expression "domiciled Englishman or Englishwoman, domiciled Frenchman or Frenchwoman," &c., means a man or woman domiciled in England, or a man or woman domiciled in France, &c.

(*h*) See especially, *Urquhart v. Butterfield* (1887), 37 Ch. D. (O. A.) 337, 381, judgment of Cotton, L. J.; *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347, 360.

(*i*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441. On this point there is no doubt. The domicile of a legitimated minor is during his minority clearly that of his father. The only doubt is how far legitimation affects the domicile of origin of the legitimated person. See pp. 106, 107, 108, *ante*.

(*k*) *Crumpton's Judicial Factor v. Finch-Noyes*, [1918] S. C. 378, Ct. of Sess.

(*l*) If he does not live with his mother, his domicile need not necessarily change together with hers. *In re Beaumont*, [1893] 3 Ch. 490.

(*m*) See p. 133, *post*.

(*n*) See, as to England being *D*'s domicile of origin, Rule 6, p. 106, *ante*.

(*o*) 3 Mer. 67.

(*p*) *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 138, judgment of Lord Campbell. See *In re Beaumont*, [1893] 3 Ch. 490; Phillimore, ss. 115—119.

The principle on which the domicile of a minor may be changed through the acquisition of a new domicile by his mother, when a widow, appears to be this: The domicile of the minor does not in strictness follow, as a matter of law, the domicile of his mother, but may be changed by her, for "the change in the domicile of an infant which, as is shown by the decision in *Pottinger v. Wightman* (q), may follow from a change of domicile on the part of the mother, is not to be regarded as the necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which, in their interest, she may abstain from exercising, even when she changes her own domicile" (r).

The position of a widow, then, with regard to her child, who is a minor, may be thus described: She may change her own domicile and settle with him in another country. She in this case, in fact, changes the minor's domicile, but she does not, as a matter of law, change his domicile simply by changing her own. Thus, a widow is left, on the death of her husband, with three children, who are minors. She and they are domiciled in Scotland. She afterwards settles in England with her two eldest children and acquires an English domicile. The two eldest children, thereupon, become domiciled in England. The youngest child, *D* (though occasionally visiting his mother), remains and resides permanently in Scotland until he attains his majority. *D* retains his Scottish domicile (s).

Questions as to effect of widow's change of domicile.—Difficult questions may, however, be raised as to the effect of a widow's change of domicile on that of her children, when she is not their guardian. Such questions may refer to the two different cases of minors who reside and of minors who do not reside with their mother.

First question.—Suppose that a minor resides with his mother, who is not his guardian. The question may be raised whether the domicile of the minor is determined by that of the mother, or by that of the guardian. No English case absolutely decides the precise point, but it may be laid down with some confidence that,

(q) 3 Mer. 67.

(r) *In re Beaumont*, [1893] 3 Ch. 490, 496, 497, judgment of Stirling, J.

(s) See *In re Beaumont*, [1893] 3 Ch. 490. This case is not quite decisive, as the widow changed her domicile in consequence of re-marriage. See also *Crumpton's Judicial Factor v. Finch-Noyes*, [1918] S. C. 378.

even if a guardian can in any case change the domicile of his ward, yet the domicile of a child living with his mother, whilst still a widow, will be that of the mother and not of the guardian (*t*).

Second question.—Suppose that a minor resides away from his mother, who is not his guardian. The question whether it is on his mother or his guardian that the change of the child's domicile depends presents some difficulty. In the absence of decisions on the subject, it is impossible to give any certain answer to the inquiry suggested. It is quite possible that, whenever the point calls for decision, the Courts may hold that there are circumstances under which a minor's domicile must be taken, even in the lifetime of the mother, to be changed by the guardian.

These questions, and others of a similar character, really raise the general inquiry whether, as a matter of law, a minor's domicile is identified with that of his widowed mother, to the same extent to which it is identified with that of his father during the father's lifetime?

To this general inquiry a negative answer must, as already pointed out (*u*), be given. There are various circumstances under which the Courts will hold that a minor, in spite of a change of domicile on the part of his mother, retains the domicile of his deceased father. Still, in general, the rule appears to hold good that the domicile of a minor, whose father is dead, usually in fact changes with the domicile of the child's mother (*x*).

D is the son of a person domiciled in Jersey. When *D* is ten years old his father dies. *D*'s mother leaves Jersey, taking *D* with her, and settles and acquires a domicile in England. *D* thereupon acquires an English domicile (*y*).

(3) *Case of minor without living parents.*—It is possible that the domicile of an orphan follows that of his guardian, but whether this be so or not is an open question (*z*).

In the first place, it may be doubted (*a*) whether the rule is not rather that a ward's domicile can be changed, in some cases, by his guardian, than that it follows the domicile of his guardian. It is

(*t*) See American cases, *Ryall v. Kennedy*, 40 N. Y. (S. C.) 347; *Holyoke v. Haskins*, 5 Pick. 20; *School Directors v. James*, 2 Watts & Serg. 568.

(*u*) See p. 129, *ante*.

(*x*) *In re Beaumont*, [1893] 3 Ch. 490.

(*y*) See *Pottinger v. Wightman* (1817), 3 Mer. 67; compare *In re Beaumont*, [1893] 3 Ch. 490.

(*z*) See, however, Westlake (5th ed.), s. 250.

(*a*) This doubt is strengthened by *In re Beaumont*, [1893] 3 Ch. 490.

difficult to believe that the mere fact of *D*'s guardian acquiring for himself a domicile in France can deprive *D*, the son of a domiciled Englishman, of his English domicile.

In the second place, the power of a guardian to change at all the domicile of his ward is doubtful. In the leading English case on the subject (*b*), the guardian was also the mother of the children. As a matter of common sense, it can hardly be maintained that the home of a ward is, in fact, or ought to be, as a matter of convenience, identified with the home of his guardian, in the same way in which the home of a child is naturally identified with that of his father. Should the question ever arise, it will possibly be held that a guardian cannot (*c*) change the domicile of his ward, and almost certainly that he cannot do this unless the ward's residence is, as a matter of fact, that of the guardian (*d*).

D is the orphan son of a domiciled Englishman. *M* is *D*'s guardian. *M* takes *D* to reside in Scotland, where *M* himself settles and acquires a domicile. *D* possibly acquires a Scottish domicile.

Sub-Rule 1 (*e*) may, perhaps, be extended to the domicile of an adult, who, though he has attained his majority, has never attained sufficient intellectual capacity to choose a home for himself. From the language used by the Court in one case, it would appear that such a person may be considered to occupy a condition of permanent minority.

D, in the case referred to, was the son of an Englishman domiciled in Portugal. There never was a period when *D*, though

(*b*) *Pottinger v. Wightman* (1817), 3 Mer. 67.

(*c*) "It seems doubtful whether a guardian can change an infant's domicile. The difficulty is that a person may be guardian in one place and not in another." *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 625, per Wickens, V.-C. See, as to the position of a guardian, Rule 144, pp. 517—520, *post*.

(*d*) On the Continent it is generally held that the minor's domicile is fixed by the father's death, and cannot be changed during minority by the mother or guardian, except by act of law. The preponderating opinion in England and America is, that such a change by a surviving parent will be sustained by the Courts, when it is made reasonably and in good faith. Wharton, s. 41; and see American cases, *School Directors v. James*, 2 Watts & Serg. 568; *Holyoke v. Haskins*, 5 Pick. 20; *White v. Howard*, 52 Barb. 294. The leading English case is *Pottinger v. Wightman* (1817), 3 Mer. 67. It does not appear to be approved by Story, s. 506, p. 709, note 1, and on the whole there is considerable doubt whether the Continental rule will not be ultimately maintained by our Courts. For a discussion of the whole question, see Jacobs, *Law of Domicil*, ss. 249—256.

(*e*) See p. 127, *ante*.

he attained his majority, could think and act for himself in the matter of domicile otherwise than as a minor could. After *D* became of age, his father acquired an English domicile. Under these circumstances, the effect of the father's change of domicile had to be considered, and the law on the subject was thus laid down:—

“I am assuming that [*D*] was of unsound mind throughout his majority,—in other words, that there never was a period during which he could think and act for himself in the matter of domicile otherwise than as a minor could. And if this be so, it would seem to me that the same reasoning which attaches the domicile of the son to that of his father while a minor would continue to bring about the same result, after the son had attained his majority, if he was continuously of unsound mind. The son in this case continued under the control of his father, was presumably supported by him, and, if he had not already been in England when his father returned hither in 1843, would, it may reasonably be presumed, have been brought with him. At no period could he, according to the hypothesis [that he was continuously of unsound mind] have acted for himself in choosing a domicile, and if his next of kin and those who had the control of his movements and life were not capable of changing his domicile, that domicile would, from the moment of his majority, have become indelible. The better opinion, in my judgment, is, that the incapacity of minority never having in this case been followed by adult capacity, continued to confer upon the father the right of choice in the matter of domicile for his son, and that in 1843, . . . that right was exercised by the adoption of an English domicile for himself which drew with it a similar domicile for his son” (*f*).

The extension of the general rule applies only to persons of continuously unsound mind. If a son on attaining his majority enjoys a period of mental capacity, he can acquire a domicile for himself. Whether, if he became incapable, his acquired domicile could be changed, is a matter of doubt. The question in his case is the same as the inquiry which is hereinafter considered (*g*), how far the domicile of a lunatic can be changed during lunacy.

(*f*) *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611, 618, judgment of Sir J. P. Wilde. The case is not decisive, as the Court held that, if the son was capable of choosing a domicile, he had, as a matter of fact, chosen that of his father.

(*g*) See comment on Rule 18, p. 152, *post*.

Exception 1 to Sub-Rule 1.—The domicile of a minor is not changed by the mere re-marriage of his mother.

Comment.

If an infant's father dies, the infant's domicile "follows, in the absence of fraud, that of its mother, until such time as the mother re-marries, when, by reason of her own domicile being subordinate to that of her husband, that of the infant ceases to follow any further change by the mother, or, in other words, "does not follow that of its stepfather" (*i*): This doctrine laid down in an American case is to a certain extent followed by our Courts, with the result that an infant domiciled in England at the time of his mother's re-marriage as a general rule retains the domicile which he had immediately before the mother's re-marriage (*k*).

But the American doctrine is not to be followed to its full extent. It is reasonable to hold that the fiction which assigns to a woman on marriage the domicile of her husband should not be extended so as necessarily to give to stepchildren the domicile of their stepfather; but it is less easy to see why it should be held that a widow, on re-marriage, loses all control over the domicile of her infant children, born during her first marriage (*l*).

Our Courts, therefore, hold (*m*) that while the re-marriage of a widow, whereby she acquires a new domicile, does not of itself affect the domicile of her infant children, yet, if a woman after her second marriage in fact changes her domicile, *e.g.*, from England to Germany, and takes the infant children of her first husband with her, they, too, acquire a German domicile (*n*).

The father and mother of a minor are, at the death of the father, domiciled in England. The widow retains her English domicile until her marriage in England with a Frenchman resident in

(*h*) See *Crumpton's Judicial Factor v. Finch-Noyes*, [1918] S. C. 378, and the American cases, *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347; *Brown v. Lynch*, 2 Bradf. Surrogate Rep. (N. Y.) 214. Compare, as to American views, Jacobs, *Law of Domicil*, s. 244. But contrast *In re Beaumont*, [1893] 3 Ch. 490.

(*i*) *Ryall v. Kennedy*, 40 N. Y. (Superior Court) 347, 360, *per curiam*.

(*k*) The same principle applies to the marriage of the mother of an illegitimate infant.

(*l*) *In re Beaumont*, [1893] 3 Ch. 490. See judgment of Stirling, J., p. 497, where this remark is approved.

(*m*) *Ibid.*

(*n*) *Ibid.*

England, but domiciled in France. She thereby acquires a French domicile. The minor retains his English domicile.

The father and mother of *D*, a minor, are at his birth domiciled in England. The father dies, and the mother thereupon, when *D* is two years old, goes with him to Germany, marries a German, and acquires a German home and domicile. *D* resides with his mother. *D*, perhaps, acquires a German domicile.

Exception 2 to Sub-Rule 1.—The change of a minor's home by a mother or a guardian does not, if made with a fraudulent purpose, change the minor's domicile.

Comment.

A mother or guardian, perhaps, cannot change the domicile of a minor when the change of home is made for a fraudulent purpose, *e.g.*, to affect the distribution of a minor's estate, in case of his death (*o*). The existence, however, of this exception is open to doubt.

D, a minor, whose father is dead, is domiciled in England. *M*, the minor's mother, expecting him to die, takes him in Jersey, and acquires a domicile there, in order that the succession to *D*'s property may be according to the law of Jersey, and not according to that of England.

It is doubtful whether *D*'s domicile does not remain English.

SUB-RULE 2.—The domicile of a married woman is during coverture the same as, and changes with, the domicile of her husband (*p*).

(*o*) See *Pottinger v. Wightman* (1817), 3 Mer. 67.

(*p*) *Dolphin v. Robins* (1859), 7 H. L. C. 390; *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *In re Daly's Settlement* (1858), 25 Beav. 456; *In re Mackenzie*, [1911] 1 Ch. 578. Compare Westlake, ss. 252, 253; Phillimore, ss. 73—78; Savigny, s. 357. Westlake lays down that the domicile of a wife not judicially separated *a mensa et toro* is that of her husband (s. 253), and apparently inclines to the opinion that such separation, though not amounting to divorce, may possibly enable her to establish a separate domicile. The authority, however, for this suggestion is slight. Foote (4th ed.), p. 58, apparently holds that a wife deserted by her husband retains the matrimonial domicile although the husband acquires a fresh domicile elsewhere, and cites *Armytage v. Armytage*, [1898] P. 178, 185. But this case does not support Foote's contention, as the Court there held that jurisdiction to decree separation did not depend upon domicile. See *Armytage v. Armytage*, [1898] P. 178, 188. Contrast, however, as signs of a tendency to allow a wife to obtain

Comment.

A woman, of whatever age, acquires at marriage the domicile of her husband, and her domicile continues to be the same as his, and changes with his, throughout their married life.

The fact that a wife actually lives apart from her husband (*q*), that they have separated by agreement (*r*), that the husband has been guilty of misconduct, such as would furnish defence to a suit by him for restitution of conjugal rights (*s*), does not enable the wife to acquire a separate domicile (*t*). It is an open question whether even a judicial separation (not amounting to a divorce) would give a wife the power to acquire a domicile for herself (*u*). "If," says Lord Kingsdown, "any expressions of my noble and learned friend (*x*) have been supposed to lead to the conclusion, that his impression was in favour of the power of the wife to acquire a foreign domicile [not her husband's], after a judicial separation, it is an intimation of opinion in which at present I do not concur. I consider it to be a matter, whenever it shall arise, entirely open for the future determination of the House" (*y*).

D, an Englishwoman, married *M*, a domiciled Englishman.

in certain cases a separate domicile from her husband for the purpose of obtaining a divorce, Rule 63, p. 291, *post*, the Exception thereto, p. 294, *post*, *Stathatos v. Stathatos*, [1913] P. 46, and above all, *De Montaignu v. De Montaignu*, [1913] P. 154.

(*q*) *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

(*r*) *Dolphin v. Robins* (1859), 7 H. L. C. 390, followed *In re Mackenzie*, [1911] 1 Ch. 578.

(*s*) *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11.

(*t*) The provisions of the British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), ss. 7A, 10, which permit in certain cases a divergence of nationality between husband and wife, may render it difficult to maintain the strict rule of domicile in the case, *e.g.*, of a deserted wife whose husband has left England, or a wife whose husband has been deported; cf. *Dolphin v. Robins* (1859), 7 H. L. C. 390, 417, per Lord Cranworth; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146, 155, per Lord Finlay.

(*u*) *Dolphin v. Robins*, 7 H. L. C. 390, 420; *Le Sueur v. Le Sueur* (1877), 1 P. D. 139; 2 P. D. 79.

(*x*) Lord Cranworth.

(*y*) 7 H. L. C. 420, judgment of Lord Kingsdown; cf. Lord Campbell, 423; *In re MacKenzie*, [1911] 1 Ch. 578, 592—594. In *Lord-Advocate v. Jaffrey*, [1921] 1 A. C. 146, the idea of a judicial separation affording a ground for change of domicile is disapproved by Lords Haldane, at pp. 151—153, and Shaw, pp. 168—171, but left open by Lords Finlay, pp. 155, 156, and Dunedin, p. 163. It is doubted in *Armstrong v. Armistage*, [1898] P. 178, 196, and *Anghinelli v. Anghinelli*, [1918] P. (C. A.) 247, 254, 256.

After some years they agreed to live separate, and ultimately obtained a divorce, which, however, was not valid, from the Scottish Courts. *D*, after the supposed divorce, resided in France, and during *M*'s lifetime married *N*, a domiciled Frenchman. *M*, her English husband, remained domiciled in England till *D*'s death in France. *D*, at her death, was domiciled in England and not in France (*z*).

RULE 10.—A domicile cannot be acquired by a dependent person through his own act (*a*).

Comment and Illustration.

A person who is not *sui juris* may, as a matter of fact, acquire an independent home. Thus *D*, an infant of eighteen, emigrates to Australia, buys a farm, and settles there. He in fact makes a home for himself in Australia. So, again, if *D*, a married woman, has entirely ceased to live with her husband (who resides in England), and goes and settles in Germany, with the intention of passing the rest of her life there, it is clear that she has in fact acquired an independent German home. What the rule in effect lays down is that there is a distinct difference, in the point under consideration, between a home and a domicile, and that though an infant or a wife may sometimes in fact, as in the cases supposed, acquire a home, neither of them can acquire an independent domicile.

(1) *Minor*.—It is certain that, as a general rule, no one can during his minority acquire a domicile for himself (*b*).

It has, however, been suggested (*c*) that a man, though a minor, may possibly acquire a domicile for himself by marriage, or

(*z*) *Dolphin v. Robins* (1859), 29 L. J. P. & M. 11; 7 H. L. C. 390.

(*a*) *Somerville v. Somerville* (1801), 5 Ves. 749 *a*, 787, judgment of Arden, M. R. The case of a female infant who changes her domicile on marriage, as where an Englishwoman of eighteen marries a domiciled Frenchman, may perhaps be held to afford a verbal exception to this Rule. This is not a real exception. The change is not effected by the infant's act, but by a consequence attached by law to the *status* arising from her act.

(*b*) *Somerville v. Somerville* (1801), 5 Ves. 749 *a*, 787, judgment of Arden, M. R. Conf. *Forbes v. Forbes* (1854), Kay, 341; *Jopp v. Wood* (1865), 4 De G. J. & S. 616, 625; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357, 383, 384, judgment of Lindley, L. J., pp. 384, 385, judgment of Lopes, L. J.; Jacobs, Law of Domicil, s. 229.

(*c*) See Savigny, Guthrie's transl. (2nd ed.), s. 353, p. 100, and compare Westlake (1st ed.), s. 37, with Westlake (5th ed.), s. 249. See also *Stephens v. McFarland* (1845), 8 Ir. Rep. 444.

by setting up an independent household. The reason for this suggested exception to the general rule is that a married minor must be treated as *sui juris* in respect of domicile, since on his marriage he actually founds an establishment separate from the parental home. This reason must, if valid, extend to all cases in which a minor in fact acquires an independent domicile, and it is not satisfactory. It involves some confusion between domicile and residence (*d*), and derives no support from the view taken by English law as to an infant's liability on his contracts, which is in no way affected by his marriage. The reasoning, therefore, by which the suggested exception is supported may be held unsound, and the existence of the exception itself be deemed open to the gravest doubt.

(2) *Married Woman*.—Though a wife may acquire a home for herself, she can under no circumstances have any other domicile or legal home than that of her husband (*e*):

SUB-RULE.—Where there is no person capable of changing a minor's domicile, he retains, until the termination of his minority, the last domicile which he has received (*f*).

Illustration.

D is a minor, who at the death of his father has an English domicile. His mother is dead, and he has no guardian. *D* cannot change his own domicile, there is no person capable of changing it. *D* therefore retains his English domicile.

RULE 11.—The last domicile which a person receives whilst he is a dependent person continues, on his becoming an independent person, unchanged until it is changed by his own act.

Comment.

This is an obvious result of Rule 4 (*g*). It applies to the case, first, of a person who attains his majority, and secondly, of a wife whose coverture is determined either by death or by divorce.

(*d*) See p. 84, *ante*.

(*e*) *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11; *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; 29 L. J. P. & M. 34. See p. 134, n. (*p*), *ante*.

(*f*) See Rules 4—10, pp. 103—136, *ante*.

(*g*) See p. 103, *ante*.

SUB-RULE 1.—A person on attaining his majority retains the last domicile which he had during his minority until he changes it (*h*).

Illustration.

D is the son of *M*, a domiciled Englishman. While *D* is a minor, *M* emigrates to America. *D* thereupon acquires an American domicile. When *D* attains his majority, *M* is still domiciled in America. *D* retains his American domicile until by his own act he either resumes his English domicile, or acquires a new, *e.g.*, a French domicile.

SUB-RULE 2.—A widow retains her late husband's last domicile until she changes it (*i*).

Illustrations.

1. *D*, a woman whose domicile of origin is English, is married to a German domiciled in Prussia. Her husband dies. *D* continues living in Prussia. *D* retains her Prussian domicile.

2. *D*, after the death of her German husband, leaves Prussia to travel, without any intention of returning to Prussia. *D* resumes her English domicile of origin.

3. *D*, after the death of her German husband, settles in France with the intention of residing there permanently. *D* acquires a French domicile.

4. *D*, after the death of her German husband, marries at Berlin an American domiciled at New York. *D* acquires a domicile at New York.

SUB-RULE 3.—A divorced woman retains the domicile which she had immediately before, or at the moment of divorce, until she changes it.

(*h*) A possible question may be raised as to domicile of an infant widow. Probably it remains that of her husband, and cannot be changed (except in consequence of re-marriage) till she comes of age.

(*i*) See Story, s. 46, citing Dig. Lib. 50, tit. 1, l. 38, s. 3; *Gout v. Zimmermann* (1847), 5 Notes of Cases, 440, 455; Jacobs, Law of Domicil, s. 222. If a widow is insane (*semble*) she retains her late husband's domicile at the time of his death; see p. 152, *post*.

Comment.

The position of a divorced woman is for the present purpose the same as that of a widow (*k*).

III. ASCERTAINMENT OF DOMICIL (*l*).*Domicil—How Ascertained.*

RULE 12.—The domicile of a person can always be ascertained by means of either

- (1) a legal presumption; or
- (2) the known facts of the case.

Comment.

Even on the assumption that every one has at all times a domicile, there may often (if the thing be considered without reference to rules of law) be a difficulty in determining where a given person, *D*, had his home or domicile at a particular moment. The difficulty may arise from ignorance of the events of *D*'s life, or from the circumstance that the facts which are known to us leave it an open question whether *D* was at a given moment (say at the date of his death) domiciled in England or in Scotland. Under such circumstances, an inquirer who had no other object than the investigation of truth, and who was neither aided nor trammelled by legal rules, would, if he tried to ascertain where *D* was domiciled at the date of his death, be forced to acquiesce in the merely negative conclusion that *D*'s domicile at that date could not be ascertained. To this negative result the Courts, from obvious motives of convenience, refuse to come (*m*), and will always, however slight or inconclusive in itself may be the character of the evidence placed before them, determine in what country *D* was at a given moment domiciled.

(*k*) If a marriage is declared a nullity, the wife presumably recovers her domicile at the time of the marriage; see Rule 65, p. 300, *post*.

(*l*) The *criteria* or proofs of domicile are most fully investigated, Phillimore, ss. 211—351.

(*m*) Contrast this with the absence of any legal presumption as to the moment at which a death takes place. *In re Phené's Trusts* (1870), L. R. 5 Ch. 139; *In re Walker* (1871), L. R. 7 Ch. 120; *Mason v. Mason* (1816), 1 Mer. 308.

This result is obtained partly by the use of certain legal presumptions (*n*), partly, where the claims of each of two places to be *D*'s domicile are on the known facts of the case all but equally balanced, by allowing the very slightest circumstance (*o*) to turn the scale decisively in favour of the one rather than of the other (*p*). Hence (though the fact is not always realised by writers on domicile) the process by which a person's domicile is determined by the Courts has a somewhat artificial character.

Legal Presumptions.

RULE 13.—A person's presence in a country is presumptive evidence of domicile.

Comment.

"A person's being in a place is *primâ facie* evidence of his being domiciled there, and it lies on those who say otherwise "to rebut this presumption" (*q*). "The actual place where [a man] is, is *primâ facie* to a great many given purposes, "his domicile" (*r*). Hence the importance often attached in questions of domicile to the place of birth and to the place of death.

Place of birth.—The place of a man's birth has in itself no necessary connection with the place of his domicile, for though *D* be born in England, yet if *D*'s father is then domiciled in France, *D*'s domicile of origin is not English but French (*s*). If, however, nothing be known about *D*'s domicile except the fact of his birth in England, this fact is ground for a presumption that *D*'s domicile at the moment of his birth, and, therefore, *D*'s domicile of origin, was English.

It is, of course, on this ground that a foundling (*t*), of whom nothing is known but the fact of his being found within the

(*n*) See Rules 13, 14, *post*.

(*o*) See Rules 15—18, pp. 142—162, *post*.

(*p*) Compare *In re Patience* (1885), 29 Ch. D. 976; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617; *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180.

(*q*) *Bruce v. Bruce* (1790), 2 B. & P. 229, 231, per Lord Thurlow.

(*r*) *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198, 301, per Loughborough, C.

(*s*) See Rule 6, p. 106, *ante*.

(*t*) *Ibid*.

limits of a particular country, *e.g.*, England, acquires a domicile of origin in that country.

Place of death.—The place of a person's death in no way of itself affects his domicile, but the fact that he was present in a particular country at the moment of his death is, in the absence of any proof to the contrary, ground for a presumption of his being then domiciled in that country.

"A man [it has been said] (*u*) is *primâ facie* domiciled at the "place where he is resident at the time of his *death*; and it is "incumbent on those who deny it to repel the presumption of law, "which may be done in several ways. It may be shown that [*D*] "was there as a traveller, or on some particular business, or on a "visit, or for the sake of health; any of which circumstances will "remove the impression that he was domiciled at the place of his "death."

The principle here laid down is sound. Where, indeed, there is a balance of evidence between the claims of two possible domicils, the place of a man's death is irrelevant. For "there is not a "single dictum, from which it can be supposed that the place of the "death in such a case as that shall make any difference. Many "cases are cited in Denisart to show, that the death can have no "effect; and not one, that that circumstance decides between two "domicils" (*x*); but if nothing which throws light on a man's domicile be known, then his death at a place is important, as giving rise to the application of the general principle that the place where a person *is* must, in the absence of counter evidence, be assumed to be his domicile.

RULE 14.—When a person is known to have had a domicile in a given country he is presumed, in absence of proof of a change, to retain such domicile (*y*).

(*u*) In an American case, *Guier v. O'Daniel*, 1 Binney's Rep. 349, note. See Phillimore, s. 235.

(*x*) *Somerville v. Somerville* (1801), 5 Vesey, 749 *a*, 788, per Arden, M. R. See also *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *Craigie v. Lewin* (1843), 3 Curt. 435.

(*y*) See *Munro v. Munro* (1840), 7 Cl. & F. 842, 891; *Aikman v. Aikman* (1861), 3 Macq. 854, 877; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617, 642, 643.

For the special difficulty of proving the loss of a domicile of origin, see *Winans v. Att.-Gen.*, [1904] A. C. 287; *In re De Almeida*, [1901] W. N. 142; *Huntly v. Gaskell*, [1906] A. C. 56.

Illustration.

D is proved to have been domiciled in Scotland in 1870. If in 1879 it be alleged that *D*'s domicile is not Scottish, the person who makes this allegation must prove it. *D*'s domicile in Scotland, that is to say, is presumed to continue until a change is proved (*z*).

Facts which are Evidence of Domicil.

RULE 15.—Any circumstance may be evidence of domicile which is evidence either of a person's residence (*factum*), or of his intention to reside permanently (*animus*), within a particular country.

Comment.

As domicile consists of, or is constituted by, residence and the due *animus manendi*, any fact from which it may be inferred either that *D* "resides," or has the "intention of indefinite residence," within a particular country is, as far as it goes, evidence that *D* is domiciled there.

"There is," it has been said, "no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his lifetime" (*a*), and the cases with regard to disputed domicile bear out this dictum.

There is no transaction in the course of a person's life which the Courts have not admitted (for whatever it is worth) in evidence

(*z*) This principle of evidence must be carefully distinguished from the legal rules that every one retains his domicile of origin until another domicile is acquired, and resumes it whenever an acquired domicile is simply abandoned. See Rule 8, p. 121, *ante*. These are simply conventional rules of law, resorted to in order to maintain the general principle that no person can be without a domicile. See Rule 2, p. 98, *ante*. Compare *In re Patience* (1885), 29 Ch. D. 976; and *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617.

(*a*) *Drevon v. Drevon* (1864), 34 L. J. Ch. 129, 133, per Kindersley, V.-C. For the different inferences as to domicile deducible from the same facts, compare the judgment of the Court of Appeal in *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617, with the judgment of Pearson, J., in the Court below (1884), 26 Ch. D. 656.

of his domicile (*b*). Hence presence in a place (*c*), time of residence (*d*), the mere absence of proof that a domicile once acquired has been changed (*e*), the purchase of land (*f*), the mode of dealing with a household establishment (*g*), the taking of lodgings (*h*), the buying of a burial place (*i*), the deposit of plate and valuables (*k*), the exercise of political rights (*l*), the way of spelling a Christian name (*m*), oral or written expressions (*n*) of intention to make a home in a particular place, or from which such an intention, or the absence of it, may be inferred, have all been deemed matters worth consideration in determining the question of a person's domicile.

While, however, it is true that there is no circumstance in a man's life which may not be used as evidence of domicile, it is also true that there are two classes of facts, viz., first, "expressions of intention," and secondly, "residence," which are entitled to special weight, as evidence of the matter (*o*) which, in questions of domicile, it is generally most difficult to establish, viz., the existence of the necessary *animus manendi*, and that certain rules, though of a very general character, may be laid down as to the effect of such facts in proving the existence of such intention (*p*).

(*b*) See, especially, *Drevon v. Drevon* (1864), 34 L. J. Ch. 129; *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13; *Aitchison v. Dixon* (1870), L. R. 10 Eq. 589; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617; *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285; *In re Patience* (1885), 29 Ch. D. 976; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617; *Stevenson v. Masson* (1873), L. R. 17 Eq. 78.

(*c*) *Bruce v. Bruce* (1790), 2 B. & P. 229; *Bempde v. Johnstone* (1796), 3 Vesey, 198.

(*d*) *The Harmony* (1800), 2 C. Rob. 322.

(*e*) *Munro v. Munro* (1840), 7 Cl. & F. 842, 891.

(*f*) *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985.

(*g*) *Somerville v. Somerville* (1801), 5 Vesey, 749 *a*.

(*h*) *Craigie v. Lewin* (1843), 3 Curt. 435.

(*i*) *In re Capdevielle* (1864), 33 L. J. Ex. 306; 2 H. & C. 985.

(*k*) *Curling v. Thornton* (1823), 2 Add. 6, 18; *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285.

(*l*) *Brunel v. Brunel* (1871), L. R. 12 Eq. 298.

(*m*) *Ibid.*

(*n*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307; *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441; *Drexel v. Drexel*, [1916] 1 Ch. (C. A.) 251; *Davis v. Adair*, [1895] 1 Ir. R. (C. A.) 379; *Moffett v. Moffett*, [1920] 1 Ir. R. (C. A.) 57.

(*o*) No special rules can be given as to the evidence of a person's residence in a particular place. Residence is a physical fact, to be proved in the same way as any other physical fact, *c.g.*, the commission of an assault. The mode, therefore, in which the fact is to be proved, calls for no special notice in this work.

(*p*) See Rules 16—18, *post*.

RULE 16.—Expressions of intention to reside permanently in a country are evidence of such an intention, and in so far evidence of domicile (*q*).

Comment and Illustration.

A person's intention with regard to residence may be inferred from his expressions on the subject. These expressions may be direct, as where *D* says or writes that it is his purpose to settle in Scotland. They may be indirect, as where *D* by his acts, *e.g.*, the purchase of a burial-ground at Edinburgh, intimates an intention of acquiring or keeping a Scottish home.

D, an English peer, who had lived for some time in France, expressed in a letter a deliberate intention of never returning to England. He also accepted the jurisdiction of a French Court, on the ground, expressed in a letter to his solicitor, of his being *bonâ fide* domiciled in France, and added, "I have no domicile in "England or any other country excepting the one [France] from "which I now write" (*r*). These expressions, combined with other circumstances, were, after *D*'s death, held to prove that he was in fact domiciled in France.

Direct expressions, however, of intention may be worth little as evidence (*s*). The person who uses them may not know what constitutes a domicile. He may call a place his home, simply because he often lives there. He may wish to be, or to appear, domiciled in one country, while in fact residing permanently and intending so to reside, *i.e.*, being domiciled, in another. A direct statement, in short, that *D* considers himself domiciled, or to have his home in France, though it may sometimes be important, may often carry little weight. This remark specially applies to the description which a person gives of himself in formal documents, as, *e.g.*, "*D* residing in France" (*t*).

(*q*) See *Hamilton v. Dallas* (1875), 1 Ch. D. 257; *Crookenden v. Fuller* (1859), 1 Sw. & Tr. 441; *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Bell v. Kennedy* (1868), L. R. 1 Sc. App. 307; *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, 445; *Maxwell v. McClure* (1860), 3 Macq. 852; *Spurway v. Spurway*, [1894] 1 Ir. R. 385.

(*r*) *Hamilton v. Dallas* (1875), 1 Ch. D. 257, 259.

(*s*) See *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441; compare *In re E. R. Smith* (1896), 12 T. L. R. 223, 224; *In re Craignish*, [1892] 3 Ch. 180.

(*t*) *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391; 1 H. & C. 12; *Hamilton v. Dallas* (1875), 1 Ch. D. 257; *Udny v. Udny* (1869), L. R. 1 Sc. App. 441.

A person's purpose may be more certainly inferred from his acts than from his language. Thus the fact that *D* keeps up a large establishment in England (*u*), that he occupies a particular kind of house (*x*), that he deposits his plate and valuables there (*y*), and a hundred other circumstances, may be indicative of a purpose to live permanently in England, and, therefore, be evidence of his having an English domicile.

RULE 17.—Residence in a country is *prima facie* evidence of the intention to reside there permanently (*animus manendi*), and in so far evidence of domicile (*z*).

Comment.

“Residence,” though not the same as domicile, is not only one of the elements which go to make up domicile, but is also in many cases the main evidence for the existence of the other element which constitutes domicile, viz., the *animus manendi*. “Residence alone has no effect *per se*, though it may be most important, as “a ground from which to infer intention” (*a*). But the effect of residence as evidence depends both on the *time* and on the *mode* of residence.

Time.—Time or length of residence does not of itself constitute domicile (*b*). An ambassador, for example, might reside thirty years in the country of the Court to which he is sent, without acquiring a domicile in a foreign country. Nor does the law of England, like some other systems, prescribe a definite length of residence, *e.g.*, ten years, after which a person shall be assumed to have acquired a domicile in a particular country. On the other hand,

(*u*) *Somerville v. Somerville* (1801), 5 Vesey, 749 *a*; *Forbes v. Forbes* (1854), 23 L. J. Ch. 724; Kay, 341.

(*x*) *Craigie v. Lewin* (1843), 3 Curt. 435.

(*y*) *Curling v. Thornton* (1823), 2 Add. 619.

(*z*) *Munro v. Munro* (1840), 7 Cl. & F. 842; *The Harmony* (1800), 2 C. Rob. 322. Compare *In re Patience* (1885), 29 Ch. D. 976; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617; *In re Bullen-Smith* (1888), 4 T. L. R. 398.

(*a*) *Munro v. Munro* (1840), 7 Cl. & F. 842, 877, per Cottenham, C.

(*b*) *In re Patience* (1885), 29 Ch. D. 976; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617. Thus a person who has a domicile of origin in England does not lose it and acquire a Scottish domicile simply by making his home in Scotland for many years, unless, in the circumstances of the case, his doing so clearly shows his intention to abandon his English domicile of origin. *Huntly v. Gaskell*, [1906] A. C. 56. See also *Winans v. Attorney-General*, [1904] A. C. 287.

no length of time is necessary for the acquisition of a home or domicile. *D* emigrates to America, with the intention of settling there, and actually begins his residence there; he forthwith acquires an American domicile. But time, which is not an element of domicile, is the most important evidence of domicile; a residence, that is to say, by *D* for thirty years in England is strong evidence of his purpose to reside there, and therefore of his having an English domicile. This is the sense in which the following well-known passage is to be understood:—

“Time is the grand ingredient in constituting domicile. I think “that hardly enough is attributed to its effects (c); in most cases it “is unavoidably conclusive; it is not unfrequently said, that if “a person comes only for a special purpose, *that* shall not fix a “domicile. That is not to be taken in an unqualified latitude, and “without some respect had to the time which such a purpose may “or shall occupy; for if the purpose be of a nature that *may* “*probably* or *does actually* detain the person for a great length “of time, I cannot but think that a general residence might grow “upon the special purpose. A special purpose may lead a man to “a country, where it shall detain him the whole of his life. A “man comes here to follow a lawsuit; it may happen, and indeed “is often used as a ground of vulgar and unfounded reproach “(unfounded as matter of just reproach though the fact may be “true) on the laws of this country, that it may last as long as “himself. . . . I cannot but think that against such a long “residence, the plea of an original special purpose could not be “averred; it must be inferred, in such a case, that other purposes “forced themselves upon him and mixed themselves with his “original design, and impressed upon him the character of the “country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly “reasonable not to bind him too soon to an acquired character, “and to allow him a fair time to disengage himself; but if he “continues to reside during a good part of the war, contributing, “by payment of taxes, and other means, to the strength of that “country, I am of opinion that he could not plead his special “purpose with any effect against the rights of hostility” (d).

(c) *I.e.*, as evidence of domicile.

(d) *The Harmony* (1800), 2 C. Rob. 322, 324, 325, per Sir W. Scott. It should be noticed that this passage refers to what is known as a “commercial domicile” during the period of war, and that time is of much more consequence in determining the existence of such a domicile than in determining the existence

The effect of time must not be exaggerated. It is weighty as evidence, but it is not more than evidence of domicile (*e*).

Mode.—The effect of residence in a country as evidence of a man's intention to continue residing there depends, to a great extent, on the manner of his residence.

If *D* not only lives in France but buys land there, and makes that country the home of his wife and family, there is clearly far more reason for inferring a purpose of residence on his part, than if he has merely taken lodgings in Paris, and lives there alone.

The presence, indeed, of a man's wife and family is sometimes spoken of as decisive (*f*), which it certainly is not; but this and various less important facts, such as the place where a man educates his children (*g*) or exercises his political rights (*h*), indicate, though they do not prove, a fixed residence, and thus go to make up the evidence for domicile.

RULE 18.—Residence in a country is not even *primâ facie* evidence of domicile, when the nature of the residence either is inconsistent with, or rebuts the presumption of, an intention to reside there permanently (*animus manendi*) (*i*).

Comment and Illustrations.

If *D* resides in France, this residence is *primâ facie* evidence of his intending to reside there, and, therefore, of his having a French domicile; so, further, if *D*, who has been a domiciled Englishman, takes up his residence in France, the fact of his dwelling in France gives, especially if he lives there for a long time, a *primâ facie* reason for believing that he intends to make France his home, and, therefore, intends to acquire, and has

of a domicile properly so-called. See *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285, 313, per Dr. Lushington.

(*e*) See *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 732, judgment of Kindersley, V.-C.; *In re Grove* (1888), 40 Ch. D. 216, 226, judgment of Stirling, J.

(*f*) *Douglas v. Douglas* (1871), L. R. 12 Eq. 617; *Forbes v. Forbes* (1854), Kay, 341.

(*g*) *Haldane v. Eckford* (1869), L. R. 8 Eq. 631.

(*h*) *Brunel v. Brunel* (1871), L. R. 12 Eq. 298.

(*i*) See *Jopp v. Wood* (1865), 4 De G. J. & S. 616; 34 L. J. Ch. 212; *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285, 329, 330; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357; *Abdallah v. Rickards* (1888), 4 T. L. R. 622; *Goulder v. Goulder*, [1892] P. 240.

acquired, a French domicil. But if *D*, having been a domiciled Englishman, resides in France under circumstances which preclude the possibility of the residence being the result of any purpose on his part to reside permanently in France (as, for example, if *D* is an English prisoner of war, kept captive in France), or which make it at any rate probable that *D* means to retain his English domicil (as where *D* lives at Paris as an English ambassador to the French Court), then *D*'s residence is no proof whatever of his intention to reside in France as his home, and he may be presumed to retain his English domicil.

The law on this point has been laid down authoritatively.

"We think that length of residence, according to its time and circumstances, raises the presumption of intention to acquire domicil. The residence may be such, so long, and so continuous, as to raise a presumption nearly, if not quite, amounting to a *præsumptio juris et de jure*; a presumption not to be rebutted by declarations of intention, or otherwise than by actual removal. Such was the case of *Stanley v. Bernes* (*k*). The foundation of that decision, in this respect, was, that a Portuguese domicil had been acquired by previous residence and acts, and that mere declarations of intention to return could not be sufficient to prove an intention not to acquire a Portuguese domicil.

"In short, length of residence *per se* raises a presumption of intention to abandon a former domicil, but a presumption which may, according to circumstances, be rebutted.

"It would be a dangerous doctrine to hold that mere residence, apart from the consideration of circumstances, constitutes a change of domicil. A question which no one could settle would immediately arise, namely, what length of residence should produce such consequence. It is evident that time alone cannot be the only criterion. There are many cases in which a very short residence would constitute domicil, as in the case of an emigrant, who, having wound up all his affairs in the country of his origin, departs with his wife and family to a foreign land and settles there. In a case like that, a residence for a very brief period would work a change of domicil.

"Take a contrary case, where a man, for business or pleasure, or mere love of change, is long resident abroad, occasionally returning to the country of his origin, and maintaining all his natural connections with that country: the time of residence

(*k*) (1831) 3 Hagg. Ecc. 373.

“would not to the same extent, or in the same degree, be proof of a change of domicile.

“We concur, therefore, in the doctrine held in many previous cases, that to constitute a change of domicile, there must be residence, and also an intention to change.

“With respect to the evidence necessary to establish the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case; and each case must vary in its circumstances; and, moreover, in one, a fact may be of the greatest importance, but in another, the same fact may be so qualified as to be of little weight” (l).

Domicil of particular classes of persons.—The principle laid down in the passages cited explains, without recourse to any special rule of law, the position of most of the persons supposed to have a, so-called, necessary domicile (m).

These persons are:—

1. *Prisoners*;
2. *Convicts*;
3. *Exiles or refugees*;
4. *Lunatics*;
5. *Invalids residing abroad on account of health*;
6. *Officials generally*;
7. *Ambassadors*;
8. *Consuls*;
9. *Persons in military or naval service*;
10. *Persons in Indian service*;
11. *Ecclesiastics*;
12. *Servants*;
13. *Students* (n).

(l) *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285, 329, 330, *per curiam*. Compare *Jopp v. Wood* (1865), 4 De G. J. & S. 616, 621, 622, *per Turner, L. J.*

(m) “A necessary domicile” is in strictness a domicile not determined by the purpose or choice of the party, but by the direct operation of some rule of law; such, for example, is the domicile of a wife or of a minor.

The term, however, “necessary domicile,” is sometimes applied to the case of persons such as prisoners and ambassadors. This application of the term is erroneous. The peculiarity (if any) in the position of such persons consists in the fact that their residence in a particular country either cannot be, or is not, combined with the *animus manendi*, and therefore gives no ground for inferring that they have a domicile in such country.

(n) As to domicile of these persons, see Phillimore, ss. 67—72, 133—200:

(1) *A Prisoner*.—A prisoner retains, during imprisonment, the domicile which he possessed at its commencement. He cannot form any purpose or intention as to his residence in the place where he is imprisoned.

D, a domiciled Irishman, was imprisoned in England. "It could not," it was laid down, "be supposed that he acquired a domicile in England by residence within the walls of the King's Bench Prison. *All such residence goes for nothing*" (o).

(2) *A Convict*.—A person transported to a particular country for life absolutely loses (it is said) his original domicile. It is certainly possible that, in this instance, "the domicile of origin may be extinguished by act of law" (p). A sentence, further, of transportation (q), e.g., to Van Dieman's Land, may probably have been looked upon as an order that the convict should reside, and make his home in Van Dieman's Land, i.e., be domiciled there; but there seems to be no English decision on the subject, and in the absence of any such decision doubt may be entertained whether there be any real distinction between the position of a convict, and of a prisoner. A person, at any rate, transported for years, ought, it would seem, like a prisoner, to retain the domicile which he possessed at the beginning of his imprisonment.

Supposing, however, that a sentence of transportation destroys a man's domicile of origin, it is probable that no Courts, other than those of the sovereign inflicting the sentence, would give this effect to it. French *émigrés* were treated by our Courts as retaining their domicile of origin (r).

(3) *An Exile or Refugee* (s).—An exile cannot dwell in his

Wharton, ss. 47—54; Jacobs, ss. 264—340. Phillimore, whose treatment of the subject is ample, sometimes appears to consider that the domicile of these persons is fixed by a rule of law, whereas in general, according to English law, at any rate, their domicile (it is submitted) results simply from the application to their peculiar circumstances of the ordinary rules regulating the change and acquisition of domicile.

(o) *Burton v. Fisher* (1828), Milward's Reps. 183, 191, 192.

The case itself does not decide more than that *D* did not, as a fact, acquire an English domicile, but the principle contained in the words in italics is clearly sound: Phillimore, ss. 186, 187.

(p) *Udny v. Udny*, L. R. 1 Sc. App. 441, 458. See Phillimore, s. 191.

(q) See, however, as to abolition of sentences of transportation, 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3. An alien deported from England, if forbidden to return, would presumably lose his domicile in England.

(r) See *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *In Goods of Duchess d'Orleans* (1859), 1 Sw. & Tr. 253.

(s) Phillimore, ss. 192—200; Westlake, s. 279; Wharton, s. 54; Savigny, s. 353, p. 56, note (q).

own country (*e.g.*, France), but he is not compelled to live in England. His residence, however, in England, certainly affords no presumption of an intention to adopt an English home. Mere residence, therefore, during the time of his exile, however long, does not give him an English domicile.

D, a French *émigré*, left France, his domicile of origin, in 1792. After a short residence in Germany; he resided in England till 1815, when he was able to return and did return to France. From 1815 to 1821, he resided generally in France. In 1821, *D* bought a house in London. In 1834, he occupied this house, and lived there till his death. *D*, it was held, never acquired an English domicile, but retained his French domicile at the time of his death (*t*).

This case decides, not (as is sometimes supposed) that an exile *cannot* acquire a domicile in his adopted country, but only that the bare fact of his residence there does not give him a domicile. A refugee, probably, may acquire a domicile in a foreign country, if he chooses to adopt it as his home (*u*), and, of course, may acquire a domicile in a foreign country by remaining there after his restoration to his own country has become possible.

Whether a person convicted of crime in his own country, who to escape punishment resides in another country, acquires a new domicile in such other country, may depend on the answer to the inquiry whether, under the law of his own country, lapse of time bars liability to punishment.

D is a French citizen with a French domicile of origin; whilst domiciled in France he is, in his absence, convicted of crime and sentenced to 10 years' imprisonment. Under French law (*x*) the lapse of 20 years is a bar to liability to punishment under such sentence. *D* on being sentenced, settles in England and lives there for 20 years; he then returns to France. *Seem*, *D* has never acquired an English domicile; the reason is that he has presumably intended to return to France at the end of 20 years.

D is a British subject domiciled in England; he is convicted of crime and sentenced to 5 years' penal servitude. He at once escapes to New York, lives there 4 years and dies. *Seem*, he has acquired a domicile at New York; the reason is that under English law lapse of time is no bar to liability for punishment for crime.

(*t*) *De Bonneval v. De Bonneval* (1838), 1 Curt. 856.

(*u*) Compare *Heath v. Samson* (1851), 14 Beav. 441.

(*x*) *Code d'Instruction Criminelle*, art. 635.

D therefore presumably had no intention of ever returning to England (*y*).

(4) *A Lunatic (z)*.—There are two views as to the position of a lunatic when under control.

The first is, that he retains the domicile which he possessed at the time he became insane, or, more strictly, when he began to be legally treated as insane. This is the sound view, and is favoured by the English cases on the subject (*a*). If this view be correct, the lunatic under confinement is in the same position as a prisoner. He cannot exercise choice, or will. He cannot, therefore, acquire a domicile. Hence he retains his existing domicile (*b*). *D*, for example, is an Englishman, who becomes lunatic, and is under control. He is taken to Scotland, and placed in a Scottish asylum. He remains there until his death. He retains, on this view, his English domicile. The time in the asylum counts for nothing.

The second view is, that a lunatic is a person not *sui juris*, who stands in somewhat the same relation to his committee as a child to his father, and that, therefore, his domicile can be fixed by his committee (*c*). This view is favoured by some American cases (*d*), but is open to objection. In the case of father and child, the infant's domicile follows that of the father, but a father cannot give his son a domicile apart from his own. In the case of a committee and a lunatic, it appears to be maintained, not that a lunatic's domicile follows that of the committee, but that it can be fixed by the committee, or, in effect, that a committee has greater power over the domicile of a lunatic than a father over that of his son. If the position of a committee be compared to that of a guardian, then it must be remarked that the power of a guardian to change a ward's domicile is itself doubtful (*e*).

On the whole, the first view appears to be (at least under ordinary circumstances) the right one. The second arises from a

(*y*) *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 232, judgment of Lindley, L. J.

(*z*) Westlake (5th ed.), ss. 251, 252; Phillimore, ss. 134—139 *b*; Wharton, ss. 52, 53.

(*a*) See *Bempde v. Johnstone* (1796), 3 Ves. Jun. 198; *Hepburn v. Skirving* (1861), 9 W. R. 764; *Urquhart v. Butterfield* (1887), 37 Ch. D. (C. A.) 357.

(*b*) See Rule 4, p. 103, *ante*.

(*c*) See *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611, 617, 618, which, however, does not decide this point.

(*d*) See Wharton, s. 52.

(*e*) See Story, s. 506, p. 709, note (1), and pp. 130—132, *ante*.

confusion between the power to change a lunatic's residence and the right to change his domicile.

(5) *An Invalid*.—There is at first sight considerable difficulty in determining whether *D*, an Englishman, who resides abroad on account of his health, loses his English domicile or not. For there exists an apparent inconsistency between the different judicial dicta on the subject.

On the one hand, it has been laid down that such a residence, being "involuntary," does not change *D*'s domicile.

"There must," it has been said, "be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness" (*f*).

"A man might leave England with no intention of returning, nay, with a determination never to return, *e.g.*, a man labouring under mortal disease, and told that to preserve his life, or even to alleviate his sufferings, he must go abroad. Was it to be said that if he went to Madeira he could not do so without losing his character of an English subject—without losing the right to the intervention of the English law in the transmission of his property after his death and in the construction of his testamentary instruments? Such a proposition was revolting to common sense" (*g*).

This doctrine has been thus applied to a particular case: "If [*D*] had gone for her health to the island of Madeira, and had written letters, stating that she should die there, and had given directions that she should be buried there, [then] although she had died and been buried there, unquestionably her Scotch domicile would never have been superseded" (*h*).

On the other hand, it has been maintained that if *D* chooses to reside abroad with the intention of making the foreign country his residence permanently, or for an indefinite time, the fact that the motive of the change is health does not prevent *D* from changing his domicile. In a case of this kind the law has been judicially expounded as follows:—

"That there may be cases in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of domicile, may well be admitted. Such

(*f*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

(*g*) *Moorhouse v. Lord* (1863), 32 L. J. Ch. 295, 299; 10 H. L. C. 272, 292, per Lord Kingsdown.

(*h*) *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 139, per Lord Campbell.

“was the case put by Lord Campbell in *Johnstone v. Beattie*, but such cases must not be confounded with others in which the foreign residence may be determined by the preference of climate, or the hope or the opinion that the air or the habits of another country may be better suited to the health or the constitution. In the one case, the foreign abode is determined by necessity; in the other, it is decided by choice. . . . In settling [in Tuscany, *D*] was exercising a preference, and not acting upon a necessity; and I cannot venture to hold that in such a case the domicile cannot be changed. If domicile is to remain unchanged upon the ground of climate being more suitable to health, I hardly know how we could stop short of holding that it ought to remain unchanged also upon the ground of habits being more suitable to fortune. There is in both cases a degree of moral compulsion” (*i*).

The apparent inconsistency between these doctrines may be removed, or explained, if we dismiss all reference to motive, to external necessity, and so forth; avoid the use of the misleading terms “voluntary” and “involuntary,” and, recurring to the principle that residence combined with the purpose of permanent or indefinite residence constitutes domicile, apply it to the different cases or circumstances under which a domiciled Englishman may take up a foreign residence for the sake of his health.

These cases are three:—

First case.—*D* goes to France for relief from sickness, with the fixed intention of residing there for six months and no longer.

This case presents no difficulty whatever. *D* does not acquire a French domicile any more than he does if he goes to France for six months on business or for pleasure. The reason why he does not acquire a domicile is that he has not the *animus manendi*, but the quite different intention of staying for a determinate time or definite purpose.

Second case.—*D*, finding that his health suffers from the English climate, goes to France and settles there, that is, he intends to reside there permanently or indefinitely. *D* in this case acquires a French domicile (*k*).

(*i*) *Hoskins v. Matthews* (1856), 8 De G. M. & G. 13, 28, 29; 25 L. J. Ch. 689, 695, per Turner, L. J.

(*k*) This is precisely what *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13, decides, and decides correctly. “If I were satisfied that [*D*] intended to make England his permanent home, I do not think it would make any difference that he had arrived at the determination to make it so

Here, again, there is no deviation from general principle. *D* acquires a French domicile because he resides in France with the *animus manendi*.

Third case.—*D* goes to France in a dying state, in order to alleviate his sufferings, without any expectation of returning to England.

This is the case which has suggested the doctrine that a change of residence for the sake of health does not involve a change of domicile. The doctrine itself, as applied to this case, conforms to common sense. It would be absurd to say that *D*, who goes to Pau to spend there in peace the few remaining months of his life, acquires a French domicile. But the doctrine in question, as applied to this case, is in conformity not only with common sense, but with the general theory of the law of domicile. *D* does not acquire a domicile in France, because he does not go to France with the intention of permanent or indefinite residence, in the sense in which these words are applied to a person settling in another country, but goes there for the definite and determinate purpose of passing in France the few remaining months of his life. The third case, now under consideration, is in its essential features like the first, and not like the second, of the cases already examined. If *D* knew for certain that he would die precisely at the end of six months from the day when he left England, it would be apparent that the first case and the third case were identical. That the definite period for which he intends to reside is limited, not by a fixed day, or by the conclusion of a definite piece of business, but by the expected termination of his life, can make no difference in the character of the residence. In neither the first nor the third case is the residence combined with the proper *animus manendi*.

In no one of the three cases we have examined is there any necessity, in order to arrive at a right conclusion, for reference to the motive, as contrasted with, what is quite a different thing, the purpose or intention of residence.

We may now see that the contradictory dicta as to the effect of a residence for the sake of health do not of necessity imply any fundamental difference of opinion among the high authorities by whom these dicta were delivered. All these authorities might

“by reason of the state of his health, as to which he was very solicitous; it would be enough that for obvious reasons he had determined to make England his permanent home.” *Winans v. Attorney-General*, [1904] A. C. 287, 288, 289, judgment of Halsbury, C.

probably have arrived at the same conclusion, if they had had the same circumstances before their minds.

The Court which gave judgment in *Hoskins v. Matthews* (1) had to deal with the second of our supposed cases, and arrived at what, both according to common sense and according to theory, is a perfectly sound conclusion.

The dicta, on the other hand, of the authorities who lay down that a residence adopted for the sake of health does not involve a change of domicile, are obviously delivered by persons who had before their minds the third, not the second, of our supposed cases. These dicta, again, embody what, in reference to such a case, is, as we have shown, a perfectly sound conclusion. Their only defect is that they are expressed in terms which are too wide, and which therefore cover circumstances probably not within the contemplation of the authorities by whom they were delivered; and further, that, while embodying a sound conclusion, they introduce an unnecessary and misleading reference to the motives which may lead to the adoption of a foreign domicile.

(6) *Officials generally*.—Official residence in a country is not in itself evidence of an intention to settle there, because all that can (in general) be inferred from such residence is that the official resides during the time and for the purpose of his office. This is clearly so when the office is held for a limited period. There is no reason to infer from the fact of a domiciled Englishman becoming Lord-Lieutenant of Ireland, or Governor-General of India (m), that he means to give up his English home or domicile. The presumption is strongly (if not conclusively) in favour of his intending to retain his English domicile.

Occasionally, however, official residence may be *prima facie* proof of a change of domicile. This is so when the office itself, from its tenure and nature, requires the official to make a home in the country where he resides. Thus, it has been suggested that if a domiciled Scotsman takes an English living, he may, on coming into residence, be assumed to have the intention of residing

(1) 25 L. J. Ch. 689; 8 De G. M. & G. 13. Compare *James v. James* (1908), 98 L. T. 438. *Semble*, the case is consistent with the doctrine here laid down, but the judgment emphasizes the fact that the person concerned desired not to abandon the advantages of his position under English law. Compare Rule 7, p. 109, *ante*.

(m) See *Attorney-General v. Pottinger* (1861), 6 H. & N. 733; 30 L. J. Ex. 284; *Attorney-General v. Rowe* (1862), 1 H. & C. 31.

permanently in England, hence to acquire an English domicile (*n*). Such a case is exceptional. As a rule, official residence is not a fact from which a change of domicile can be inferred, but much depends on the nature of the office.

(7) *An Ambassador (o)*.—An ambassador who represents his sovereign at a foreign court in general retains his existing domicile, which is, in most cases, the country the sovereign whereof he represents.

The reason of this is obvious. The residence of an English ambassador in France does not raise the slightest presumption of his intention to make his home in France, and it is possible, though not certain, that the duties of an ambassador may be held absolutely incompatible with his *acquiring* a domicile in the country where he resides whilst he remains an ambassador.

An ambassador, however, if he is before his appointment already domiciled in the country where he resides as ambassador, retains his domicile in spite of his office, and this, though the domicile in the place of his residence is an acquired domicile, and the country which he represents is his domicile of origin. *D*, an Italian, acquires a domicile in England. He afterwards is appointed the representative of Italy at the English court. *D* retains his English domicile (*p*). Though, in short, an ambassador or *attaché* does not in general acquire a domicile in the country where he resides, this is simply the result of his residence being in general unconnected with any intention to reside permanently. In a case where it was held that an *attaché* to the Portuguese Embassy retained the English domicile, which he had acquired before his appointment, the Court say, "We are not saying that "if a man should have continued an *attaché* for forty or fifty "years, that he would thereby, *simpliciter*, acquire an English "domicil, and that his property would be subject to legacy duty. "We affirm nothing of the sort. What we do affirm is, that he, "having acquired an English domicile, does not lose it *ipso facto*, "without more, by taking this office of an *attaché*" (*q*).

(8) *A Consul*.—A consul does not and cannot be presumed to acquire a domicile by merely living in a country as consul. On

(*n*) See judgment of Lord Jeffrey in *Arnott v. Groom* (1846), 9 D. 142, 149—152.

(*o*) Phillimore, ss. 171—178; Story, s. 48.

(*p*) *Heath v. Samson* (1851), 14 Beav. 441.

(*q*) *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391, 397, per Bramwell, B.

the other hand, he does not, by becoming consul, lose any domicile he already possesses. The length of his residence as consul is immaterial (*r*).

D, an Englishman, resides at Leghorn for twenty years as English consul. *D* does not acquire an Italian domicile.

(9) *A Person in military or naval service*.—A soldier does not acquire a domicile in the place where he is stationed, but is domiciled in the territory of the sovereign whom he serves.

The first part of this principle results from the nature of modern military service. A soldier does not, and in fact cannot, acquire a domicile in the place where he is stationed (*s*). For *D*, an English soldier serving in Canada, cannot, during his service, however long, “settle” in Canada.

The second part of this principle is not supported by many cases, but is, it is conceived, so far well established that we may presume, unless there is evidence to the contrary, that a soldier or sailor (in the naval service) is domiciled in the country of the sovereign whom he serves, *i.e.*, that he means to have his home within the territory of that sovereign, or at least not within the territory of any other power.

Hence the following results:—

(i) *A soldier or sailor in the service of his own sovereign retains the domicile which he had on entering the service, wherever he may be stationed (t)*.

D, an Irish officer, though stationed in England, retains his Irish domicile of origin.

D, whose domicile of origin is English, acquires a domicile of choice in the Isle of Man. He enters the army and is stationed in Canada. He retains his Manx domicile of choice (*u*).

(*r*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Sharpe v. Crispin* (1869), L. R. 1 P. & D. 611; *The Indian Chief* (1801), 3 C. Rob. 12, 22; *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1.

(*s*) See judgment of Watson, B., *Re Steer* (1858), 28 L. J. Ex. 22, 25.

(*t*) This statement is approved by Lindley, L. J., *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418, at p. 425. The statement applies no less to a domicile of choice (*In re Macreight* (1885), 30 Ch. D. 165) than to a domicile of origin. See *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574; 29 L. J. P. & M. 34. Compare *Attorney-General v. Napier* (1851), 6 Ex. 217; 20 L. J. Ex. 173; *Brown v. Smith* (1852), 15 Beav. 444; 21 L. J. Ch. 356, with *Craigie v. Lewin* (1843), 3 Curt. 435. See *Firebrace v. Firebrace* (1878), 4 P. D. 63, 65, 66; *Ex parte Barne* (1886), 16 Q. B. D. (C. A.) 522; *In re E. R. Smith* (1896), 12 T. L. R. 223; and Westlake (5th ed.), ss. 273, 274.

(*u*) *In re Macreight* (1885), 30 Ch. D. 165.

(ii) *A person who enters the military or naval service of a foreign sovereign (probably) acquires a domicile in the country of such sovereign.*

D, a domiciled Englishman, enters the Russian army, and dies while serving in it. He, perhaps, may be presumed to have acquired a Russian domicile (*x*). A soldier or sailor who serves a foreign sovereign certainly does not acquire a domicile at the particular place where he is stationed.

A question has further been raised, and not settled, whether a soldier who retains his rank in the service of one sovereign can, even by residence combined with the *animus manendi*, acquire a domicile in a country subject to another.

The Privy Council thus express themselves on this point:—

“We do not think it necessary for the decision of this case, that we should lay down as an absolute rule that no person being the colonel of a regiment in the service of the East India Company, and a general in the service of Her Majesty, can legally acquire a domicile in a foreign country. It is not necessary, for the decision of this case, to go so far; but we do say that there is a strong presumption of law against a person so circumstanced abandoning an English domicile and becoming the domiciled subject of a foreign power” (*y*).

The matter becomes, in short, a question of evidence. There is the strongest presumption that *D*, who is in the service of the English Crown, does not, even though he resides in France, mean to reside there permanently, but this presumption probably might be rebutted by sufficiently strong evidence (*z*).

(10) *A Person in the Indian service.*—The rules established with reference to the domicile of persons in the service of the East

(*x*) See this statement made *arguendo* in *Somerville v. Somerville* (1801), 5 Vesey, 749 *a*, 757, and apparently admitted by the Court; *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418, 421, per Baggallay, L. J. Compare, also, cases such as *Craigie v. Lewin* (1843), 3 Curt. 435, as to service under the East India Company, and Westlake, *ss.* 264—266. There may be a difficulty in applying this doctrine in the case of States made up of several countries, and it is clear that there is no more than a presumption, which can be rebutted. See *Gran v. Gran* (1921), *The Times*, April 29, 1921, where the domicile of a Norwegian subject who entered the Royal Air Force in England was determined on grounds of intention to settle in England. Compare *Ex parte Cunningham* (1888), 13 Q. B. D. (C. A.) 418, 423, per Cotton, L. J.

(*y*) *Hodgson v. De Beauchesne* (1858), 12 Moore, P. C. 285, 319. Conf. *Bremer v. Freeman* (1857), 10 Moore, P. C. 306.

(*z*) *Attorney-General v. Pottinger* (1861), 30 L. J. Ex. 284, which, however, is not decisive.

India Company were peculiar (a), and are now admitted to have been anomalous.

With the death of the former servants of the East India Company their operation has ceased, and a domicile in India can only be obtained in the same way as a domicile in any other civilized country (b).

(11) *An Ecclesiastic*.—A clergyman possessed of a cure must (it is said) be held domiciled at the place of his cure (c).

The most that can be laid down is that there is a strong presumption in favour of his intention to reside there permanently. There is no reason to suppose that if the intention did not in fact exist the presumption might not be rebutted.

(12) *A Servant*.—A servant (it is sometimes laid down) has the domicile of his master.

There is not, however, any authority in English law, or anything in the circumstances of modern life, establishing a definite rule, or even a presumption, as to the domicile of a servant. Whether he has, or has not, a "permanent home," in the same country as his master must, as in other cases, depend upon the combination of fact and intention. The nature of the service may, under some circumstances, tell in favour, and in others against a presumption, that the servant adopts his employer's domicile (d).

(13) *A Student*.—There is certainly in English law nothing to justify any peculiar rule or presumption as to the domicile of a student.

As to the domicile of the foregoing classes of persons, the following points may be noticed:—

First. Several of the cases enumerated, such, *e.g.*, as that of an ecclesiastic, a servant, or a student, present, in fact, no peculiarity

(a) For these rules, see *Conflict* (2nd ed.), pp. 156—158; and for their theoretical justification, compare *Jopp v. Wood* (1865), 34 L. J. Ch. 212, 219, per Turner, L. J., with *Wauchope v. Wauchope* (1877), 4 R. 945.

(b) Compare *Casdagli v. Casdagli*, [1919] A. C. 145. The principle of this decision is binding on all Courts in British India as regards the interpretation of the Indian Succession Act, 1865, under which (ss. 10, 11) intestate succession is regulated by the law of the domicile of the deceased. In *Keyes v. Keyes* (1921), 37 T. L. R. 499; [1921] P. 204, the Court declined to recognise an Anglo-Indian domicile as justifying the divorce of parties whose residence in India was temporary only, and the justice of this decision is assumed in the Indian Divorces (Validity) Act, 1921 (11 & 12 Geo. 5, c. 18).

(c) Phillimore, s. 184. Compare *In re Dunbar* (1896), 12 T. L. R. 153, 155.

(d) Contrast, for example, the position of a Scotsman settled as a gardener in England, with that of a Frenchman, employed as courier by an English family, travelling abroad on the Continent. See Phillimore, ss. 140—148.

whatever. The legal home of these persons is clearly fixed in accordance with the ordinary principles of the law of domicile.

Secondly. The other cases have most of them these features in common, that each of the persons, such as a prisoner, or an ambassador, has a residence in one place, and a domicile in another; and that the residence exists under circumstances which preclude any presumption in favour of the existence of a domicile at the place of residence; but this will be found to result not from any special rule of law fixing the domicile of the persons in question, but from the fact that the circumstances of their respective positions, either, as in the case of a prisoner, make the existence of the *animus manendi* impossible, or, as in the case of an exile, render its existence improbable. It is, of course, true that a person who is residing in a country, where for any reason he cannot or does not acquire a domicile, is, in accordance with the general rules of the law of domicile, unable to change the domicile which he possessed on coming to the country where he resides (*e*); but his domicile is in no special sense determined by law, and cannot, therefore, be termed with any strictness of language a necessary domicile.

Thirdly. It is often said that the reason why, in some of the cases under consideration, and in others which might be mentioned, residence does not produce domicile is that the residence is "involuntary," or "under compulsion."

What is intended by these expressions is no doubt true, viz., that where residence cannot be, or is not, a consequence or a result of a purpose or intention to reside indefinitely (*animus manendi*), there cannot be a change of domicile; but the terms "involuntary," or "under compulsion," are so ambiguous, and so closely connected with logical and metaphysical problems, that they may lead, and have in fact led to confusion. Hence it has been laid down that "there must be a residence freely chosen, "and not prescribed or dictated by any external necessity, such "as the duties of office, the demands of creditors, or the relief "from illness" (*f*), whence it might be inferred that the effect of residence in producing a change of domicile depends not upon the presence or absence of the *animus manendi*, but upon the motive for the residence. This doctrine, which has already perplexed the discussion of the effect of residence abroad for the sake of health,

(*e*) See Rules 5 to 8, pp. 104—121, *ante*.

(*f*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458, per Lord Westbury.

must, unless rejected, lead to still further perplexity. It at once, for example, suggests the inquiry whether an Englishman, who resides abroad for the sake of economy, and therefore in one sense against his will, acquires a foreign domicile. This question, and the like inquiries, which can never be answered by a reference to motive, are disposed of by adhering to the sound principle that residence and the *animus manendi* are the sole constituents of domicile. If these exist, the motive for the residence becomes immaterial. The only way in which consideration of a person's motive for dwelling in one place rather than in another can be important is from its effect as evidence for the existence or non-existence of the *animus manendi*. In all the cases mentioned, of residence induced, *e.g.*, by desire to escape from illness, or by the necessity for performing official duties, it is only as evidence of intention that motive is of importance. If this once be perceived, it will be found best, as already suggested, to avoid as far as possible all reference to the question whether residence be voluntary or involuntary, except in so far as a man's willingness or unwillingness to reside in a country may be proof of his intending or not intending to make it his permanent dwelling place.

Fourthly. When the term "involuntary," or "under compulsion," is got rid of, and the true relation between motive and residence is perceived, we see how it happens that official residence is referred to, sometimes as a reason against, and sometimes as a reason for, assuming the acquisition of domicile.

We have here to deal with a question of evidence. If the "official residence" is residence for a limited time, or for a special purpose, as in the case of a Governor-General of India, the nature of the office does away with the presumption in favour of the existence of the *animus manendi*. If, on the contrary, the office is one, such as is in modern times an ecclesiastical cure, which makes it a duty for the person holding the office to fix his home permanently in a particular place, then the nature of the office adds to the strength of the presumption that he intends to make his home in the place where, for the discharge of his official functions, he resides.

(B) DOMICIL OF LEGAL PERSONS OR CORPORATIONS.

RULE 19.—The domicile of a corporation is the place considered by law to be the centre of its affairs, which

- (1) in the case of a trading corporation, is its principal place of business, *i.e.*, the place where the administrative business of the corporation is carried on (*g*),
- (2) in the case of any other corporation, is the place where its functions are discharged (*h*).

Comment.

The conception of a home or domicile, depending as it does on the combination of residence and intention to reside (*i*), is, in its primary sense, applicable only to human beings; but by a fiction of law, an artificial domicile may be attributed to legal beings, or corporations.

The following observations as to such an artificial domicile are worth notice:—

First. The domicile of a corporation is entirely distinct from the domicile of the persons who compose the corporation. Thus the London and North-Western Railway Company has its domicile in England (*k*). Its shareholders reside in England, France, Italy, &c., and have their domiciles in different countries.

Secondly. As regards the domicile of a corporation, the distinction between residence and domicile does not in general exist (*l*).

(*g*) 2 Lindley, *Company Law* (6th ed.), App. 1, pp. 1221—1223; Savigny, s. 354; Westlake (5th ed.), chap. xvi. See *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

(*h*) Compare Savigny, s. 354.

(*i*) See pp. 84—88, *ante*.

(*k*) See *Calcutta Jute Co. v. Nicholson* (1876), 1 Ex. D. 428, 446. Conf. *Attorney-General v. Alexander* (1874), L. R. 10 Ex. 20.

(*l*) But a foreign corporation which has the centre of its affairs in a foreign country, *e.g.*, France, may reside or be present in England so as to be liable to be served with a writ under Ord. IX. r. 8, if it does business in England through an agent. *Compagnie Générale Transatlantique v. Law*, [1899] A. C. 431; *Dunlop Pneumatic Tyre Co. v. Actien-Gesellschaft, &c.*, [1902] 1 K. B. (C. A.) 342. Compare Rule 59, p. 243, *post*; *Actiesselskabet Dampskib Hercules v. Grand Trunk Pacific Railway Co.*, [1912] 1 K. B. (C. A.) 222; *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden Aktiengesellschaft*, [1911] 2 K. B. (C. A.) 516.

Thirdly. The domicile of a corporation must be fixed at a definite place within a given country. The Cesena Sulphur Company is domiciled in England, because its domicile is fixed at a particular place in London.

Fourthly. There is this essential difference between the domicile of a natural person and the domicile of a corporation. The domicile of a human being is a fact which, on certain points, subjects him to the law of a particular country. The domicile of a corporation is a fiction suggested by the fact that a corporation is, on certain points, *e.g.*, the jurisdiction of the Courts, subject to the law of a particular country. A man, that is to say, is in some respects subject to the law of England because he has in fact an English domicile; a corporation is by a fiction supposed to have an English residence or domicile because it is in certain respects subject to the law of England. Hence a corporation may very well be considered domiciled, or resident, in a country for one purpose and not for another, and hence too the great uncertainty as to the facts which determine the domicile, or residence, of a corporation. In each case the particular question is not, at bottom, whether a corporation has in reality a permanent residence in a particular country, but whether, for certain purposes (*e.g.*, submission to the jurisdiction of the Courts or liability to taxation), a corporation is to be considered as resident in England, or in some other country (*m*).

Trading Corporations.

The residence and domicile of an incorporated trading company are determined by the situation of its principal place of business.

By the principal place of business is meant the place where the administrative business of the company is conducted. This may not be the place where its manufacturing or other business operations are carried on (*n*).

(*m*) Contrast, for example, the decisions as to the residence of a corporation under the Income Tax Act, 1853, s. 2, sched. D; *Cesena Sulphur Co. v. Nicholson* (1876), 1 Ex. D. 428; *Imperial Continental Gas Association v. Nicholson* (1877), 37 L. T. 717; *London Bank of Mexico, & Co. v. Apthorpe*, [1891] 2 Q. B. (C. A.) 378, with decisions as to the domicile or ordinary residence of a corporation under Ord. XI. r. 1, sub-s. (e); *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

(*n*) 2 Lindley, Company Law (6th ed.), App. 1, pp. 1221—1223. Conf. *Taylor v. Crowland Gas Co.* (1855), 11 Ex. 1; 23 L. J. Ex. 254; *Adams v. G. W. Rail. Co.* (1861), 6 H. & N. 404; *Corbett v. General Steam Navigation Co.* (1859), 4 H. & N. 482.

Thus if a company incorporated under the Companies (Consolidation) Act, 1908, for the carrying on of manufactures in India, has a registered office in England, and its affairs are conducted in England, the company is domiciled in England, not in India, and a company whose registered office is in Scotland is domiciled in Scotland (*o*), but the registration of the company is not for all purposes of itself decisive. The question in each case is, where is it that the real business of the company is carried on? According to the answer to that question, the company's domicile must, in the main, be determined (*p*).

Other Corporations.

In most cases, except those of trading companies, the domicile of a corporation is fixed by its obvious connection with some special district. This applies to incorporated towns, colleges, or hospitals, obviously formed for the discharge of functions in a particular place. The same remark is applicable to such corporations sole as bishops, rectors, &c. The domicile of a bishop, as such, must (it is conceived) be found in his see, and that of a rector, in his parish.

In the case of corporations sole, there may be a distinction between the private domicile of the person, *e.g.*, the bishop, at any given moment constituting the corporation, and his corporate domicile. Thus, though it is in modern times unlikely that an English bishop should live abroad quite away from his see, with the intention of permanently residing in a foreign country, it might be held, should such a case occur, that the bishop had acquired in his private capacity a foreign domicile. In his corporate capacity, he would be in any case held to be domiciled in his diocese.

Question.—Can a corporation have two domiciles? It may be maintained that a corporation can have two domiciles. In support of this view are cited cases in which it has apparently been decided that a corporation can, for the purpose of being sued, have a domicile in each of two countries (*q*).

Such cases are not decisive, for liability to be sued does not, in the case of a corporation, any more than of an individual, depend

(*o*) *Jones v. Scottish Accident Insurance Co.* (1886), 17 Q. B. D. 421; *Watkins v. Scottish Imperial Insurance Co.* (1889), 23 Q. B. D. 285.

(*p*) See *Cesena Co. v. Nicholson* (1876), 1 Ex. D. 428, 437, 450, 453; *Attorney-General v. Alexander* (1874), L. R. 10 Ex. 20, 32.

(*q*) *Carron Iron Co. v. Maclaren* (1855), 5 H. L. O. 416, 450.

directly upon domicile. They may each be sued in the courts of this country, if amenable to the process of our courts. On the whole, the better opinion seems to be that a corporation has, following the analogy of an individual, one principal domicile, at the place where the centre of its affairs is to be found, and that the other places in which it may have subordinate offices correspond, as far as the analogy can be carried out at all, to the residence of an individual (*r*).

(*r*) Compare *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden Aktiengesellschaft*, [1911] 2 K. B. (C. A.) 516, 526, 527, per Farwell, L. J.; *American Thread Co. v. Joyce* (1912), 106 L. T. 171; (1913), 108 L. T. 353; *In re Hilckes*, [1917] 1 K. B. (C. A.) 48.

CHAPTER III.

BRITISH NATIONALITY AND STATUS OF ALIENS (*a*).

(A) DEFINITIONS.

RULE 20.—

- (1) “British subject” means any natural person who owes permanent (*b*) allegiance to the Crown.
- (2) “Disability” means the status of being a married woman, a minor, lunatic or idiot (*c*).
- (3) “Declaration of alienage” means a declaration of a person’s desire to be an alien made under the terms of the British Nationality and Status of Aliens Act, 1914 (*d*).
- (4) “Foreign” and “foreigner” are throughout this chapter used as meaning “not British,” whereas in general throughout this Digest they mean “not English.”
- (5) “Alien” means any person who is not a British subject.

(*a*) See the British Nationality and Status of Aliens Acts, 1914 and 1918 (4 & 5 Geo. 5, c. 17; 8 & 9 Geo. 5, c. 38); the Naturalization Act, 1872 (35 & 36 Vict. c. 39). Conf. 25 Ed. 3, stat. 1; 7 & 8 Vict. c. 66; 33 Vict. c. 14; 33 & 34 Vict. c. 102; 58 & 59 Vict. c. 43; Westlake, chap. xv. British nationality now depends mainly upon the terms of the British Nationality and Status of Aliens Acts, 1914 and 1918, the terms of which a reader should specially consult. These two Acts are hereinafter referred to as the Act of 1914.

(*b*) “Permanent” allegiance is used to distinguish the allegiance of a British subject from the allegiance of an alien who, because he is within the British dominions, owes temporary allegiance to the British Crown. (*De Jager v. Attorney-General for Natal*, [1907] A. C. 326, 328, 329; *Calvin’s Case*, 7 Rep. 9; *Johnstone v. Pedlar* (1921), 37 T. L. R. 870.)

(*c*) The British Nationality and Status of Aliens Act, 1914, s. 27 (1).

(*d*) See Rules 41—43 and 46; Act 1914, ss. 5 (1), 7A (1), 14, 15.

RULE 21.—

- (1) Every natural person is either a British subject or an alien.
- (2) A British subject must be either
 - (a) a person who is or becomes a British subject on and from the day of his birth, and is called a natural-born British subject; or
 - (b) a person who becomes a British subject at some day later than the day of his birth(*e*), *i.e.*, who is not a natural-born British subject.

Comment.

Rule 21 (1) follows from the definitions given in Rule 20. More, however, than one State may claim the allegiance of the same individual, and a man whom English Courts treat as a British subject may by French Courts be treated as a French citizen. The question whether English law recognizes the existence of an alien who has no definite nationality has been decided in the affirmative (*f*).

Of the two classes of British subjects distinguished in Rule 21 (2) the former includes those cases in which natural-born British subjects are permitted to resume their nationality after losing it (*g*).

The latter class includes (a) naturalized British subjects (*h*); (b) British subjects by grant of letters of denization (called denizens) (*i*); (c) British subjects by reason of annexation of terri-

(*e*) Whether a person is in fact a British subject may be, *e.g.*, on a question of extradition, decided by a jury on the facts of the case in accordance with the law determining the acquisition of British nationality. *Guérin v. The Bank of France* (1888), 5 T. L. R. 160.

(*f*) This was doubted in *Ex parte Weber*, [1916] 1 A. C. 421, 424, 426; but affirmed in *Stoeck v. Public Trustee* (1921), 37 T. L. R. 666; [1921] 2 Ch. 67.

(*g*) See Rules 48 and 49, pp. 205, 206, *post*.

(*h*) See Rules 26, 28 and 36, pp. 183, 185, *post*.

(*i*) The right of the King to make a person a British subject by letters of denization is expressly preserved by the British Nationality and Status of Aliens Act, 1914, s. 25. But it is improbable that recourse to this power will now normally be had. The status of a denizen is substantially inferior to that of a naturalized person, for no denizen, "unless born of English parents, shall be capable to be of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown": 12 & 13 Will. 3, c. 2, s. 3, which is not affected by the British Nationality and Status

tory (*j*); and (*d*) in the case of women, British subjects by marriage (*k*).

(B) ACQUISITION OF BRITISH NATIONALITY.

(A) NATIONALITY ACQUIRED AT AND FROM DATE OF PERSON'S BIRTH.

RULE 22 (*l*).—Subject to the effect of the exceptions hereinafter mentioned, any person born within the British dominions is a natural-born British subject (*m*).

of Aliens Act, 1914, s. 3, sub-s. 2. Compare *R. v. Speyer*, [1916] 2 K. B. (C. A.) 858.

In view of the obsolescence of this mode of making British subjects, no further reference to it is made in this Digest.

(*j*) See Rules 26 and 35, pp. 183, 195, *post*.

(*k*) See Rules 27 and 37, pp. 184, 196, *post*.

(*l*) Rules 22—25 rest upon the British Nationality and Status of Aliens Act, 1914, which provides as follows:—

"Sect. 1 (1). The following persons shall be deemed to be natural-born British subjects, namely:—

"(a) Any person born within His Majesty's dominions and allegiance; and

"(b) any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted, or had become a British subject by reason of any annexation of territory, or was at the time of that person's birth in the service of the Crown; and

"(c) any person born on board a British ship whether in foreign territorial waters or not:

"Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects.

"(2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth.

"(3) Nothing in this section shall, except as otherwise expressly provided, affect the status of any person born before the commencement of this Act.

"(4) The certificate of a Secretary of State that a person was at any date in the service of the Crown shall, for the purposes of this section, be conclusive."

(*m*) It has been thought better to follow as far as possible the language used on the subject of acquisition of British nationality in the 2nd ed. of this work, Rule 22, p. xxxix. and p. 166, and ground the acquisition of British nationality at birth upon the place of birth rather than upon the place of birth and allegiance to the King. This mode of expression is more intelligible to ordinary readers than is the combination between place of birth and allegiance, and,

Comment.

This Rule expresses the fundamental principle governing the law of British nationality, that every person born within any part of the British dominions (*n*) is at and from his birth a natural-born British subject. This character attaches to him wholly irrespective of his parentage or race. The son of a Chinese subject born in Burma is as much a British subject as the son of English parents born in London. Of the enormous population of the British Empire infinitely the greater number are British subjects in virtue of the application of this Rule.

The Rule, it should be noted, involves birth within the British dominions. It is not sufficient that a person should be born in a State over which a British protectorate is exercised to confer upon him the quality of a British subject. Thus, although Egypt was in 1921 a State under British protection, an Egyptian was not a British subject, and the natives of the native States in India, which do not form part of British India, are not British subjects for purposes of English law. The inhabitants of the Malay States are in a similar position. Moreover, the same rule applies even to the inhabitants of territories, such as Southern Rhodesia or Nigeria, in which the Crown exercises the most complete authority, but over which it has not extended its formal sovereignty. Apparently the same considerations will be sufficient to prevent the natives of territory under a mandate to the Crown becoming British subjects, although the mandatory is granted by the mandates, approved by the Council of the League of Nations under Article XXII. of the Covenant, full powers of administration and legislation over the mandated territory (*o*).

It is, however, uncertain whether the same principle is applicable to territory leased in perpetuity from a foreign Power; in such cases the indefinite duration of the lease may be sufficient to

when combined with the statement of definite exceptions which really arise from the absence of allegiance, expresses the true meaning of the Act of 1914, s. 1 (1) (*a*). See for an explanation, App., Note 7, "Common Law View of British Nationality," and Note 8, "Interpretation of the British Nationality Act, 1914, s. 1."

(*n*) This includes the territory of another kingdom united by a personal union with the British Crown. See *Calvin's Case* (1608), 7 Rep. 1; *Isaacson v. Durant* (1886), 17 Q. B. D. 54.

(*o*) Compare the mandates for the former German Pacific Islands, Nauru, Samoa, and South West Africa, Parliamentary Papers, Misc. Nos. 5—8, 1921, Cmd. 1201—1204. The inhabitants of these territories are not treated as British subjects by His Majesty's Government.

convert the territory for the duration of the lease into a portion of the British dominions (*p*).

Illustrations.

1. *A* is an Englishman born in London. *S*, his son, is born in British India. *S* is clearly a natural-born British subject.

2. *S* is the son of French citizens, domiciled and living in France. They come over to Dover to stay there but for a few hours. *S* is born at Dover. *S* is a natural-born British subject.

3. *S* is the son of a Russian subject. *S* is born in Quebec. *S* is a natural-born British subject.

4. *S* is the illegitimate son of French citizens, staying in Jersey. *S* is a natural-born British subject.

Exception 1.—Any person whose father (being an alien) is at the time of such person's birth a foreign sovereign or an ambassador or other diplomatic agent accredited to the British government by the government of a foreign State is (though born within the British dominions) an alien.

Comment.

This Exception seems in itself reasonable, but is not supported by any decisive argument (*q*). It depends on international comity, and it is open to argument whether the position is not rather that no obligation based on the possession of the quality of a British subject will be enforced against the child of an ambassador, who disclaims such nationality, while such a child may if it desires claim British nationality by virtue of its birth within the British dominions.

Illustrations.

1. *S* is born in London. He is the child of the President of the United States of America. *S* is (*semble*) an alien.

(*p*) See Keith, *Theory of State Succession*, p. 87.

(*q*) See Cockburn, *Nationality*, p. 7. If the Exception applies to the child of a foreign sovereign, it presumably applies also to the child of the ruler of an Indian State, whose sovereignty is recognised by the British Government, but it can hardly apply to the child of a deposed sovereign resident in England. If it applies to the child of an ambassador, it may also apply to the child of other diplomatic envoys, but the existence of the exception is certainly not free from doubt.

2. *S* is born in London. He is the child of a Frenchman accredited to the Crown as Ambassador of the French Republic. *S* is (*semble*) an alien.

3. *S* is born in London. *S* is the child of an Italian subject accredited as Ambassador by the King of Italy to the French Republic, but on a visit to England at the time of *S*'s birth. *S* is a natural-born British subject.

Exception 2.—Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien (*r*).

Comment.

"If enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience" (*s*).

The Exception, it will be seen, is more widely worded than is authorized by the expressions used in *Calvin's Case*, which contemplate merely the case of a child of a member of a hostile force in occupation of British territory. It can, however, hardly be doubted that under modern conditions of warfare the same rule would be applied to the child of any alien enemy born in occupied territory, whether the parent formed part of the army of occupation or not, and whether or not the army of occupation belonged to the State of which the parent was a subject or citizen.

Illustration.

A French army, during a war with England, occupies Jersey. *S*, the child of a French soldier, is born in Jersey during the hostile occupation. *S* is an alien.

Exception 3.—Any person born in the British dominions while his father, an alien enemy, is imprisoned as a

(*r*) "British nationality results from birth in the British dominions, except in the case of a child born to an enemy father at a place in hostile occupation." Westlake, s. 280 (5th ed.), p. 377. *Calvin's Case* (1608), 7 Rep. 18 *u*.

(*s*) *Calvin's Case* (1608), 7 Rep. 18 *a*, 18 *b*.

prisoner of war, or interned, as a matter of precaution, in any part of the British dominions or in an allied country, is (*semble*) an alien.

Comment and Illustrations.

This Exception is speculative, and a deduction from the principle enunciated in Exception 2.

1. In 1915 *A* is a soldier of the German army engaged in war with England. *A* is captured and becomes a prisoner of war. He is imprisoned in England till the end of the war. *S*, his son, is born in England in 1916. *S* is not a natural-born British subject (*t*).

2. *A*, a German subject, marries in England in 1913. In July, 1914, he returns to Germany, leaving his wife in England, and joins the German army. He is captured in France and imprisoned in England in January, 1915. *S*, his son, born in England in February, 1915, is not a natural-born British subject, but an alien.

3. The circumstances are the same as in Illustration 2, except that *A* is imprisoned in France. *S*, his son, is (*semble*) an alien.

4. *A*, a German subject, is resident in England on the outbreak of war. In 1916 he is interned as a matter of precaution. *S*, his son, born after *A*'s internment, is (*semble*) an alien (?).

5. *A*, a German subject, remains in England throughout the war, being exempted from internment on the ground of his proved good will to England. *S*, his son, born in 1917, is a natural-born British subject (*u*).

SUB-RULE.—(1) Any person born on board a British ship, whether in foreign territorial waters or not, is a natural-born British subject.

(2) Any person born on board a foreign ship is not, by reason only that the ship was in British territorial waters at the time of such person's birth, a British subject.

In this Sub-Rule—

“British ship” means either a ship belonging to the

(*t*) See 2 Steph. Comm. (14th ed.), pp. 437, 438.

(*u*) Cf. *Porter v. Freudenberg*, [1915] 1 K. B. (C. A.) 857.

Royal Navy or a ship owned wholly by British subjects (*x*).

"Foreign ship" means a ship which is not a British ship (*y*).

"Territorial waters" includes any port, harbour, or dock.

Comment and Illustrations.

This Sub-Rule determines how far under English law a person's birth on board a ship affects his nationality.

A person born on board ship, if the ship is at the time of his birth on the high seas, is a natural-born subject of the State to which the ship belongs. This is so at common law.

S is born on board a British ship when the ship is on the high seas. *S* is a natural-born British subject, and this is so though he be the son of Italian parents, and though Italian law may hold him to be an Italian subject.

S is born on board a British ship when the ship is lying in the port of Genoa. *S* is a natural-born British subject. This is so even though *S* be by Italian law a natural-born Italian subject.

S is born on board a British ship lying in the port of Quebec. *S* is a natural-born British subject (*z*).

S, the child of French citizens, is born on board a British ship when the ship is on the high seas. *S* is a natural-born British subject.

A person born on board a foreign ship when lying in British territorial waters is not a British subject by reason only of that fact.

S, the son of an Italian subject, is born on board a foreign ship, which at the time of *S*'s birth is lying in the port of London. *S* is not by reason only of being born within the British dominions, of which the territorial waters form part, a natural-born British subject.

(*x*) In this definition "Royal Navy" includes the navies of the self-governing dominions. For the conditions under which a merchant vessel is reckoned British, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1.

(*y*) See British Nationality and Status of Aliens Act, 1914, s. 27 (1).

(*z*) Everyone born in the British dominions is a natural-born British subject. English law does not recognise any such thing as, *e.g.*, a Canadian nationality as distinguished from British nationality, nor does it recognise a Scottish or English subject as distinguished from a British subject. See *Gibson & Co. v. Gibson*, [1913] 3 K. B. 379. Cf., however, Keith, *Imperial Unity and the Dominions*, pp. 253, 254; War Government in the Dominions, p. 265.

The words "by reason only" normally (*a*) imply that in certain cases *S* may be a natural-born British subject, but the Act does not indicate what these cases are. Two views of the matter are possible. It may be held that a person born on board a foreign ship in British territorial waters is to be deemed to be born out of the British dominions, and that he therefore is a natural-born subject when he satisfies the conditions laid down in Rule 24, *i.e.*, that his father was a British subject at the time of his birth and fell within one or other of the conditions specified therein. On that interpretation, *S*, the son of *A*, a natural-born British subject born in Paris, if born on a French ship in the port of London, will not be a British subject. Similarly, *S*, the posthumous son of a natural-born British subject born in London, if born on a French ship in the port of London, will be an alien. As such results are anomalous, it may be found possible to interpret the Rule in a more restricted sense, and to hold that the child of any British subject is, though born on board a foreign ship in territorial waters, born within the British dominions and the King's allegiance, and therefore a natural-born British subject. On the other hand the child of a foreign parent, if born on a foreign ship in territorial waters, does not become a natural-born British subject.

RULE 23.—Subject to the exceptional cases enumerated in Rule 24, no person who is born out of the British dominions is a natural-born British subject.

Comment.

This Rule, when read in conjunction with Rule 22, lays down the essential features of the English Common Law as to the acquisition of British nationality. The principles accepted by that law were (1) that any person born in England was a subject of the King of England, because by birth within the territories of the King he came within the allegiance of the King of England, and thereby received protection from and owed permanent allegiance to the King; and (2) that no person not born in England could be a natural-born subject of the King. These principles have been modified in detail by the exceptions enumerated in Rules 22 and 24, but they still remain in general valid. A person born within the British dominions is *primâ facie*, and in all but a very limited

(*a*) It must, however, be noted that in sect. 12 (1) of the Act the word "only" seems superfluous. See p. 203, *post*.

number of cases, a natural-born British subject, and a person born out of the British dominions is *primâ facie*, and save in a limited number of cases, not a natural-born British subject.

The rule that nationality is acquired by birth within the British dominions is opposed to the modern tendency to trace nationality by descent (*b*), and it is open to the objection that it creates a large class of persons who are of double nationality, being claimed as British subjects on the score of birth within the British dominions and as foreign subjects by reason of descent. The practical inconvenience of this fact is undeniable, but is greatly diminished by the right of renouncing British nationality accorded to persons thus situated (*c*). On the other hand the territorial theory of allegiance and nationality has helped to facilitate the merger in the general body of the population of immigrants such as the French Huguenots, whose children born in England obtained thereby British nationality, and is a factor of value in assimilating the different racial elements in the population of the overseas British territories.

RULE 24.—Any person, though born out of the British dominions, is a natural-born British subject if his father at the time of such person's birth was a British subject, and

- (*Case 1*), was born within the British dominions, or
- (*Case 2*), was born whether before or after August 7, 1914, in a place where the King exercises extra-territorial jurisdiction over British subjects, or
- (*Case 3*), was a naturalized British subject, or
- (*Case 4*), had become a British subject by annexation of territory, or
- (*Case 5*), was in the service of the Crown (*d*).

(*b*) A proposal to recognise the acquisition of British nationality by descent from generation to generation was approved by the Imperial Conference of 1921.

(*c*) See Rule 41, p. 199, *post*.

(*d*) This Rule gives the effect of the British Nationality and Status of Aliens Act, 1914, s. 1 (1) (*b*) and proviso, which run:—

“(1) The following persons shall be deemed to be natural-born British subjects, namely:—

- “
- “(b) Any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and either was born

Comment.

This Rule defines exhaustively the circumstances in which British nationality can be obtained by inheritance in the case of a child born on or after January 1, 1915, during his father's lifetime (e).

Case 1. The child of a natural-born British father is, though born out of the British dominions, a natural-born British subject, provided that his father was born within the British dominions and the King's allegiance. If, however, his father was born in Paris, then the son is not a natural-born British subject, but an alien. Prior to the Act of 1914, any person, though born out of the British dominions, was a natural-born British subject if (a) his father or his paternal grandfather was born in the British dominions, and (b) his father was at the time of his birth a natural-born British subject and not in the actual service of any foreign prince or State in enmity with the Crown. Under the new Rule the father must be born within the British dominions, and descent from a grandfather so born is no longer a ground for British nationality (f).

Illustrations.

1. *A* is born in England. *S*, his son, is born at Naples. *S* is a natural-born British subject.
2. *A* is born in England. *B*, his son, is born at Naples. *S*, the son of *B*, is born at Paris in 1916. *S* is an alien.

"within His Majesty's allegiance or was a person to whom a certificate of naturalization had been granted, or had become a British subject by reason of any annexation of territory, or was at the time of that person's birth in the service of the Crown;

"Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects."

The wording of the Act is open to improvement; Case 1 in the Rule, the most important of all, is covered by the words "born within His Majesty's allegiance."

(e) As to posthumous children, see Rule 25 (3), p. 181, *post*. The paternal relationship must exist *de iure* at the time of birth. Though a child of, e.g., a Scottish father born in a foreign country may be legitimated *per subsequens matrimonium*, the legitimation does not avail to confer British nationality on the child. See *Shedden v. Patrick* (1854), 1 Macq. 535, 611—614, per Lord Cranworth; 623—625, per Lord Brougham; 639—641, per Lord St. Leonards. See Rule 146, p. 521, *post*.

(f) Rule 25, p. 181, *post*.

Comment.

Case 2. This is a new provision designed to meet the needs of British families settled for generations in places such as Turkey, Egypt, or Persia, or in British Protectorates such as Nigeria or Rhodesia, in which the Crown exercises jurisdiction under the Foreign Jurisdiction Act, 1890. Under the law as it stood prior to the Act of 1914, if a British subject settled in Egypt, his sons and grandsons born there would be British subjects, but his great-grandsons would be aliens. The new legislation assimilates birth in such a place to birth within the British dominions so far as regards the transmission of nationality to a child born outside the dominions. Birth in such a place, however, does not *confer* British nationality, even if the father is a British subject. The place of a man's birth affects his nationality as British only in the case of birth within the British dominions; wherever else he may be born, he can claim British nationality only by virtue of descent.

The provision defining birth within the allegiance is retrospective, and applies whether the father was born before the date of the passing of the Act of 1914 or not. The choice of the date of passing instead of the date of commencement (January 1, 1915) is obviously a matter of indifference, though the variation is curious and unnecessary (*g*).

The motive of the retrospective effect of this provision is simple. Under the law as it stood before the Act of 1914, according to the interpretation given in *De Geer v. Stone* (*h*), if *A* was a natural-born British subject born in London, his son, *B*, born in Egypt in 1880, would be a natural-born British subject, and his son, *C*, born in Egypt in 1910, would also be a natural-born British subject. *S*, the son of *C*, born in Egypt in 1916, is, therefore, the son of a British subject, but he himself is not a British subject, unless his father falls within the terms of Case 2. Thanks to the retrospective terms of the Act of 1914 in this respect, although *C* was born before the Act was passed, none the less he satisfies the condition laid down in Case 2 and is capable of transmitting British nationality to his son, *S*. But it must be noted that the Act has no retrospective effect with regard to *S*.

(*g*) Compare Rule 30, p. 189, *post*.

(*h*) (1882), 22 Ch. D. 243, interpreting the Acts 7 Anne, c. 5, s. 3; 4 Geo. 2, c. 21, s. 1; and 13 Geo. 3, c. 21. Compare *In re Willoughby* (1885), 30 Ch. D. (C. A.) 324; *R. v. Speyer*, [1916] 2 K. B. (C. A.) 858, 868, 869, per Phillimore, L. J.; *Bacon v. Bacon* (1641), Cro. Car. 602; *Doe v. Jones* (1791), 4 T. R. 300.

If he was born on December 30, 1914, he would be an alien, for the law as it existed before the coming into operation of the Act of 1914 did not confer upon him British nationality, and save as expressly provided the Act has no retrospective effect.

Illustrations.

1. *A*, a natural-born British subject, born in London in 1840, settled in Egypt in 1870. *B*, his son, born there in 1871, was, under the law then and still in force, a natural-born British subject. *C*, *B*'s son, born also in Egypt in 1895, was under the law then in force also a natural-born British subject, in virtue of the fact that his paternal grandfather, *A*, was born in the United Kingdom, and his father, *B*, was at the time of *C*'s birth a natural-born British subject. *S*, *C*'s son, born in Egypt in 1917, would, but for the passing of the Act of 1914, have been an alien. Under that Act, however, he is a natural-born British subject, as being the son of *C*, who was at the time of *S*'s birth a natural-born British subject, and who under the retrospective effect of the proviso to sect. 1 (1) (b) of the Act is deemed to have been born within His Majesty's allegiance.

2. The circumstances are the same as in the preceding Illustration except that *S* is born at Paris. *S* is a natural-born British subject. His son, *X*, whether born in Egypt or at Paris, is an alien.

Comment.

Case 3. The child of a naturalized British subject, born out of the British dominions after his father has been naturalized, is a natural-born British subject. Under the law prior to the Act of 1914, such a child could only attain the status of a naturalized British subject by residing with his parents in the United Kingdom during infancy, or with his father if in the service of the Crown out of the United Kingdom (*i*).

Illustrations.

1. *A*, an Italian subject, is naturalized in the United Kingdom in 1915. *S*, his son, born at Petrograd in 1919, is a natural-born British subject.

(*i*) Naturalization Act, 1870, s. 10 (5); *R. v. Albany Street Police Station Superintendent*, [1915] 3 K. B. 716; *Jaffé v. Keel*, [1916] 2 K. B. 476; *In re Bourgoise* (1889), 41 Ch. D. (C. A.) 310, 320, 321.

2. *W*, an Englishwoman, is a natural-born British subject; *W* marries *H*, an Italian subject, becoming by her marriage an alien. Her husband dies, whereupon she obtains naturalization (*k*) as a British subject. Her son, *S*, is born at Rome after *W*'s naturalization. *S* is not a British subject.

3. *A*, an Italian subject, applies for a certificate of naturalization, which is duly granted to him. *A* dies before he has time to take the oath of allegiance, which is required before a certificate of naturalization takes effect. *S*, his son, born at Rome on January 1, 1916, shortly before his father's death, is not a British subject (*l*).

Comment.

Case 4. A child born out of the British dominions after his father has become a British subject by reason of annexation of territory is a natural-born British subject. This provision, although it appears only in statutory form in the Act of 1914, as amended in 1918, is probably merely declaratory of the common law.

Illustrations.

1. *A*, a burgher of the Orange Free State, becomes a British subject by the annexation of that territory to the British Crown. His son, *S*, born in Holland in 1916, is a natural-born British subject, and, even if born in 1908, would probably have been a natural-born British subject.

2. *A*, a burgher of the South African Republic, died just before the annexation of the Republic to the British Crown. *B*, his wife, became by reason of the annexation a British subject. Her son, *S*, was born in Portuguese territory during a visit of *B* to her sister's home there. *S* is not a British subject.

Comment.

Case 5. The child of a British father, who at the time of the child's birth is in the service of the Crown, is, though born out of

(*k*) See Rule 28 (5), p. 186, *post*.

(*l*) *S* is the son of a person to whom a certificate of naturalization has been granted, but as *A* has not taken the oath, he is not a British subject at the time of *S*'s birth, which is an indispensable part of the condition of the inheritance of British nationality. In a suitable case *S* might be granted naturalization by the Secretary of State. See Rule 36 (2), p. 195, *post*. As regards the necessity of taking the oath, see Rule 28 (4), p. 186, *post*.

If *S* were born after the date of his father's death, he would *à fortiori* be still an alien. See Rule 25 (3), p. 181, *post*.

the British dominions, a natural-born British subject. This case looks like an extension to all British subjects in the service of the Crown of the principle recognized before the Act of 1914, under which the son of an ambassador (being a British subject) was a natural-born British subject, if born in the foreign country to the sovereign of which his father was accredited (*m*). The extension, however, of the rule involves the application of quite a different principle. In the case of an ambassador accredited to a foreign court, the fact that he represented his sovereign and was in no sense subject to the jurisdiction of the foreign State rendered it natural to ascribe British nationality to his children born in the foreign country. The extension to other servants of the Crown, such as consuls, is rendered desirable by the restriction (see *Case 1*) of the instances in which a child born out of the British dominions is a natural-born British subject. But for the new provision every child of a consul (who was himself born, *e.g.*, at Paris) would, if born out of the British dominions, be an alien.

Illustrations.

1. *A*, a British subject born in Paris, is Consul-General of the United Kingdom at New York. *S*, his son, is born at New York in 1916. *S* is a natural-born British subject. If *A* had not been in the service of the Crown the fact that he was born in Paris would have precluded his transmitting British nationality to *S*.

2. *A*, an American citizen, is British Consul in Cuba. *S*, his son, born there is not a British subject (*n*).

RULE 25 (*o*).—

- (1) British nationality cannot be inherited through a woman.
- (2) British nationality cannot be transmitted by inheritance for more than one generation.
- (3) British nationality cannot be transmitted by inheritance to any person not actually born during his father's lifetime (posthumous child).

(*m*) *Calvin's Case*, 7 Rep. 18 *a*; *Bacon v. Bacon* (1641), Cro. Car. 602; *De Geer v. Stone* (1882), 22 Ch. D. 243.

(*n*) The fact that any person was at any date in the service of the Crown may be proved by a certificate of a Secretary of State, which if given is conclusive of the issue. British Nationality and Status of Aliens Act, 1914, s. 1 (4).

(*o*) See British Nationality and Status of Aliens Act, 1914, s. 1 (1) (b).

Comment.

The three parts of this Rule are nowhere expressly enacted in the British Nationality and Status of Aliens Act, 1914, but they are necessary deductions from the terms of that Act as set out in Rules 22 and 24. No person can be a natural-born British subject whose case does not fall within one or other of these Rules, and if he is not born within the British dominions he can be a natural-born British subject only by inheritance in the cases set out in Rule 24.

(1) In all the cases set out in Rule 24 the inheritance of British nationality is through the father only, and therefore no claim to British nationality can be based on the mere fact that the mother possessed British nationality at the time of the child's birth, even if the child is legitimated *per subsequens matrimonium* (p).

(2) In all the cases inheritance depends on the father only, and the nationality of the grandfather is a matter of indifference. If *S* is born at Paris, and is the son of *B*, born there also, *B* being the son of *A*, a natural-born British subject born in London, then the nationality of *S* falls to be determined on the conditions laid down in Rule 24 which refer only to *B*, and in the circumstances *S* is not a British subject. This rule, however, has an exception in the case of children born before January 1, 1915 (q).

(3) Moreover, it is essential that the father from whom British nationality is inherited should be living at the time of the birth of the child. This follows from the express words "at the time of that person's birth" in the British Nationality and Status of Aliens Act, 1914, s. 1 (1) (b), and these words merely reproduce the analogous terms of the Act, 4 Geo. 2, c. 21, s. 1, which provided that "all children born out of the ligeance of the Crown of England or of Great Britain, whose fathers were or shall be natural-born subjects of the Crown of England or of Great Britain at the time of the birth of such children respectively . . . are hereby declared to be natural-born subjects of the Crown of Great Britain."

The Rule, which at first sight seems to work injustice to posthumous children, may be defended on the ground that such children (*e.g.*, the child of a British subject by a German wife, born in Berlin after his father's death) often have no substantial

(p) See p. 177, note (e), *ante*.

(q) See Rule 50, p. 206, *post*.

connection with the United Kingdom or other part of the British dominions, and that to confer automatically British nationality on all such children is needless, as tending to multiply the class of persons with double nationality. Any hardship may be obviated by the use of the exceptional power given to the Secretary of State to grant naturalization at his discretion to minors (*r*), for it may be assumed that this power would readily be exercised in favour of the child of a British subject whose mother desired to secure its admission to British nationality in such circumstances as these.

Illustrations.

1. *S* is the son of an unmarried Englishwoman. He is born in Paris. *S* is not a British subject.

2. *S* is born in Paris in 1916. His father, *B*, a natural-born British subject, was born in Paris in 1890. His grandfather, *A*, was born in London in 1860. *S* is not a British subject.

3. *S* is born in Paris in 1919 after the death of his father, *A*, a natural-born British subject, born in London. *S* is not a British subject.

4. *S* is the son of *H* and *W*, born ten years before his parents marry. *H* at the time of the birth of *S*, and also at the time of his marriage to *W*, was domiciled in Scotland, but *S* was born in France, where *W* was living at the time of his birth. *S* by the marriage of *H* and *W* becomes legitimated, but he is not a natural-born British subject (*s*).

(B) NATIONALITY ACQUIRED LATER THAN DATE OF PERSON'S BIRTH.

I.—BY PERSON NOT UNDER DISABILITY.

(1) *Annexation.*

RULE 26.—On the acquisition of territory by the Crown, whether by annexation or cession, all persons, nationals of the annexed or cessionary state, resident in the territory annexed or ceded, become British subjects,

(*r*) See Rule 36 (2), p. 195, *post*.

(*s*) See *Shedden v. Patrick* (1854), 1 Macq. 535. The result is the same whether *W* is of British nationality or not, and whether her domicile at the time of *S*'s birth and her marriage with *H* is Scottish or not.

unless other provision is made in the instrument of annexation or cession (*t*).

Comment.

The fact that the status of a British subject may arise through annexation of territory is alluded to in the British Nationality and Status of Aliens Act, 1914, ss. 1 (1) (b) and 27 (1). In cases of cession of territory the nationality of persons connected with the ceded territory is normally regulated in detail in the treaty of cession. In the absence of treaty stipulations, it is doubtful to what extent persons connected with the territory automatically acquire British nationality. It may be presumed that persons who continue to reside in it become British subjects, but it is uncertain whether the same rule applies to persons domiciled in it, if not resident at the time of annexation (*u*). On a personal union between the Crown of the United Kingdom and another kingdom the inhabitants of the latter kingdom do not, if born before the union, become British subjects (*v*).

Illustrations.

1. *S*, a burgher of the Orange Free State, continues to reside there after the annexation of the territory to the British Crown. He is a British subject.

2. *S*, a burgher of the South African Republic, leaves the country during the South African War on a mission to secure help in Europe for the Boers. He was domiciled in the Republic, and, though on the annexation he remains in Europe, he does not acquire a domicile in any European country. He (*semble*) is not a British subject, despite the annexation.

(2) *Marriage.*

RULE 27.—An alien woman who marries a British subject shall be deemed to be a British subject, and shall

(*t*) This is assumed in British Nationality and Status of Aliens Act, 1914, s. 1 (1) (b).

(*u*) See Keith, *Theory of State Succession*, chap. vi., pp. 42—48; *Campbell v. Hall* (1774), 20 St. Tr. 323; *Donegani v. Donegani* (1835), 3 Knapp, 63, 85; *Mayor of Lyons v. East India Co.* (1836), 1 Moo. P. C. 175, 287; *Fabrigas v. Mostyn* (1774), Cowp. 161; *Jephson v. Riera* (1835), 3 Knapp, 130.

(*v*) *Calvin's Case* (1608), 7 Rep. 1, but contrast *Isaacson v. Durant* (1886), 17 Q. B. D. 54, 59.

not, by reason only of the death of her husband or the dissolution of her marriage, cease to be a British subject (*x*).

Comment.

This Rule represents a complete departure from the common law principle, which remained intact up to 1844, under which marriage with a British subject did not affect the nationality of an alien woman. The Act of 1914 makes explicit what was probably implied in the earlier legislation, that the status of a British subject acquired by marriage is not affected by reason only of the death of the husband or the dissolution by the Courts of the marriage.

Illustrations.

1. *S*, a Frenchwoman, marries a British subject. She becomes a British subject.

2. After her husband's death *S* remains a British subject, unless and until she effects a change in her nationality, *e.g.*, by marrying a Frenchman.

(3) *Naturalization.*

RULE 28.—(1) A Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State

- (a) that he has either resided in the British dominions for a period of not less than five years in the manner required by this Rule, or been in the service of the Crown for not less than five years within the last eight years before the application; and
- (b) that he is of good character and has an adequate knowledge of the English language; and
- (c) that he intends if his application is granted either to reside in the British dominions or to enter or continue in the service of the Crown.

(*x*) British Nationality and Status of Aliens Act, 1914, ss. 10 and 11.

(2) The residence required by this Rule is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of the British dominions, for a period of four years within the last eight years before the application.

(3) The grant of a certificate of naturalization to any such alien shall be in the absolute discretion of the Secretary of State, and he may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision.

(4) A certificate of naturalization shall not take effect until the applicant has taken the oath of allegiance.

(5) In the case of a woman who was a British subject previous to her marriage to an alien and whose husband has died or whose marriage has been dissolved, the requirement of this Rule as to residence shall not apply, and the Secretary of State may in any other special case, if he thinks fit, grant a certificate of naturalization, although the four years residence or five years service has not been within the last eight years before the application.

(6) For the purposes of this Rule a period spent in the service of the Crown may, if the Secretary of State thinks fit, be treated as equivalent to a period of residence in the United Kingdom (*y*).

Comment.

This Rule follows the language of the British Nationality and Status of Aliens Act, 1914, s. 2, which modifies in important respects the provisions of the Naturalization Act, 1870. The Secretary of State for Home Affairs is the Secretary of State charged in practice with the administration of the Act, though in accordance with the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 12 (3), the powers conferred may be exercised by any of His

(*y*) Act 1914, s. 2.

Majesty's Principal Secretaries of State for the time being. The Secretary of State has under the Act (z) extensive powers of making from time to time regulations on matters of procedure which have statutory validity.

It is important to note that, while an applicant for naturalization is bound to satisfy the Secretary of State that he fulfils the three conditions enumerated in Rule 28 (1), the Secretary of State retains absolute and unfettered discretion as to whether he will grant a certificate. The importance, whether for good or bad, of this provision cannot be exaggerated. Under the Act naturalization may be encouraged or discouraged from time to time according to the policy of the Government of the day.

The Secretary of State has also definite powers of facilitating the acquisition of naturalization. Thus he may permit an applicant to reckon a period spent in the service of the Crown as equivalent to a period of residence in the United Kingdom; and he may waive the requirement that the period of four years residence or service for five years must have been within eight years previous to the date of application. In the case of a woman who was a British subject before losing that status by marriage with an alien, the requirements as to residence are entirely waived (a).

The British Nationality and Status of Aliens Act, 1918, s. 3, sub-s. 2, provides that "no certificate of naturalization shall, "before the expiration of a period of ten years after the termination of the present war (*i.e.*, August 31, 1921), be granted in "the United Kingdom to any subject of a country which at the "time of the passing of this Act (*i.e.*, August 8, 1918) was at "war with His Majesty, but this provision shall not apply to a "person who (a) has served in His Majesty's Forces or in the "Forces of any of His Majesty's allies or of any country acting "in naval or military co-operation with His Majesty; or (b) is a "member of a race or community known to be opposed to the "enemy Governments; or (c) was at birth a British subject." The discretion of the Secretary of State is, of course, in no way fettered as regards refusal of a certificate even in cases which fall within the exception to this enactment, and it is evidently left to him to decide in each case whether an applicant satisfies the description of being a member of a race or community known to be opposed to the enemy Governments. It may be assumed that nationals of the countries liberated by the allies from the control

(z) Ss. 19—24; Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 32 (3).

(a) See also Rule 49, p. 205, *post*.

of the enemy governments will not be deemed to fall within the Act, so that, *e.g.*, a Czecho-Slovakian will be eligible for naturalization (*b*).

Illustrations.

1. *S*, the applicant, has lived for the last seven years partly in London, partly in the Isle of Wight, and has never been out of the United Kingdom during such years. *S* is an Italian subject. *S* is in a position to apply for a certificate of naturalization on July 1, 1920.

2. The case is the same as in Illustration 1, but *S* only came of age on June 1, 1920. *S* is in a position to apply for a certificate, the fact that for the greater period of his residence he was a minor not affecting his right to apply.

3. *S*, an Italian subject, has been for the last six years in the service of the Crown as Consul at Naples. He has never resided at any time in the United Kingdom. *S* is in a position to apply

4. *S* is an Italian subject. *S* applies for a certificate, relying on the fact that he three years ago was in the service of the Crown as Consul at Naples, and for the last two years before his application has been residing in the United Kingdom. The Secretary of State thinks fit that the years spent in the service of the Crown should be treated as equivalent to a period of residence in the United Kingdom. This being so, *S* is in a position to apply. But note that, as he bases his application on residence in the British dominions, it is necessary that, as in this case, the last of the five years should be a time of residence in the United Kingdom.

5. *S* is an Italian subject. *S*, ten years ago, resided for a year in London. *S* has during the last four years resided in London but he makes out his five years of residence by counting in the year he resided in London ten years ago. His residence, therefore, in the British dominions has not been wholly within the eight years immediately preceding his application. *S* is not in a position to apply, unless the Secretary of State chooses to waive this requirement in his case.

6. *S*, an Italian subject, has resided in London for five years and has also been in the service of the Crown for the same time. The Secretary of State declines to grant a certificate. *S* has no remedy or right to appeal against this decision.

(*b*) Compare the definition of alien enemy in the Aliens Restriction Amendment Act, 1919 (9 & 10 Geo. 5, c. 92), s. 15.

7. The Secretary of State grants a certificate to *S*. *S* omits to take the oath of allegiance. *S* is not, until he has taken the oath, a naturalized British subject.

RULE 29.—The Secretary of State may, in his absolute discretion, in such cases as he thinks fit, grant a special certificate of naturalization to any person with respect to whose nationality as a British subject a doubt exists, and he may specify in this certificate that the grant thereof is made for the purpose of quieting doubt as to the right of the person to be a British subject, and the grant of such a special certificate shall not be deemed to be any admission that the person to whom it was granted was not previously a British subject (*c*).

Comment.

Cases may well arise in which it may be doubtful whether *S* has or has not a right to be a British subject. The Secretary of State may in his absolute discretion grant to *S* a certificate for the purpose of quieting such doubts. It is provided under the Rule itself that the special certificate shall not be deemed to be any admission that *S*, the person to whom it is granted, was not previously a British subject. On the other hand the grant of such a certificate cannot, it is clear, be used in any way as a proof that *S* was a British subject at the time when his nationality was doubtful, *e.g.*, in a case where an application is made to the High Court for a declaration as to *S*'s right to be deemed a natural-born British subject under the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93).

RULE 30.—An alien who has been naturalized before the passing of the British Nationality and Status of Aliens Act, 1914 (*d*), may apply to the Secretary of State for a certificate of naturalization under that Act, and the Secretary of State may grant to him a certificate on such terms and conditions as he may think fit (*e*).

(*c*) British Nationality and Status of Aliens Act, 1914, s. 4.

(*d*) August 7, 1914. The date should clearly have been the coming into effect, *i.e.*, January 1, 1915. Compare p. 178, *ante*.

(*e*) British Nationality and Status of Aliens Act, 1914, s. 6.

Comment.

As regards the United Kingdom, this provision is not of very great importance. It appeared in the Naturalization Act, 1870, s. 7, when it was of importance as facilitating the acquisition by aliens naturalized under the Act of 1844 of the wider privileges conceded by the Act of 1870. It may, however, have some value even now, since the extent of the privileges granted by the Act of 1870 was doubtful as regards territorial limits. It was held by the Imperial Government that a certificate of naturalization issued under the Act of 1870 conferred upon an alien the status of a natural-born British subject through the British dominions, while doubt was cast on this doctrine in certain quarters. The effect of a certificate under the Act of 1914 is, on the other hand, clearly defined (see Rule 33), and application for it on this ground is possible.

Indirectly, however, the provision facilitates the acquisition by persons who have been naturalized under colonial Acts with purely local application and effect of full Imperial naturalization, even if they have not complied with the conditions laid down in Rule 28 for naturalization. This arises from the fact that under sect. 8 of the Act of 1914, which confers on the governments of British possessions the same powers of naturalization as are possessed by the Secretary of State (*f*), it is open to the government of such a possession to grant a certificate of naturalization to any person naturalized under a colonial enactment. But the grant of such a certificate is made subject to the approval of the Secretary of State in all cases of British possessions other than India or one of the five self-governing Dominions, and this provision effectively prevents the undue extension of Imperial naturalization to persons not duly qualified.

RULE 31.—A person to whom a certificate of naturalization is granted by a Secretary of State shall, subject to the provisions of the Rules in this Chapter (*g*), be entitled to all political and other rights, powers, and privileges, and be subject to all obligations, duties, and liabilities to which a natural-born British subject is entitled or subject, and as from the date of his naturali-

(*f*) See Rule 33, p. 193, *post*.

(*g*) See Rules 32, 33 and 49, pp. 191, 193, 205, *post*.

zation (*h*) have to all intents and purposes the status of a natural-born British subject (*i*).

Comment.

This Rule places a naturalized British subject in nearly the same position in respect of rights, powers, and obligations as a natural-born British subject. It is, however, expressly provided in the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1, that a British subject who has obtained that status by naturalization or denization shall not be qualified to be the owner of a British ship unless during the time he is owner of the ship he is either resident in the British dominions or a partner in a firm actually carrying on business in the British dominions. A naturalized British subject may make a will of movables in any of the forms permitted by the Wills Act, 1861 (24 & 25 Vict. c. 114), ss. 1 and 2 (*k*). It is, however, not clear whether a naturalized British subject is a natural-born subject within the meaning of the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93) (*l*). It has been decided (*m*) that the provision of the Act of Settlement (*n*) disqualifying naturalized persons from holding certain offices, including that of Privy Councillor, was implicitly repealed by the provision in the Naturalization Act, 1870, which is reproduced in the Act of 1914, and that provision of the Act of Settlement is expressly repealed in the Act of 1914.

RULE 32.—The status of a natural-born British subject differs from the status of a naturalized British subject in two characteristics:—

(1) The acquisition of the status of a natural-born British subject depends upon circumstances absolutely independent of the assent of the government, whereas the acquisition of the status of a naturalized British subject does depend on the assent thereto of the government.

(*h*) *I.e.*, from the date on which an alien to whom a certificate has been granted has taken the oath of allegiance.

(*i*) British Nationality and Status of Aliens Act, 1914, s. 3 (1). Compare Rule 33, p. 193, *post*.

(*k*) See Rule 195, *post*.

(*l*) See Rule 66, p. 305, *post*.

(*m*) *R. v. Speyer*, [1916] 2 K. B. (C. A.) 858.

(*n*) 12 & 13 Will. 3, c. 2, s. 3.

(2) There exists under English law (subject to the effect of Rule 46, *post*) no power on the part of the government to deprive a natural-born British subject of his British nationality, but there does exist under the British Nationality and Status of Aliens Act, 1914, a power on the part of the government to deprive a naturalized British subject of his British nationality on account of his having committed certain offences (*o*).

Comment.

These two differences have not been much noticed but are important. The acquisition of the status of a natural-born British subject depends either on the locality of a person's birth (Rule 22), or on descent (Rule 24), neither of which conditions directly and in itself involves any assent on the part of the government. A person, on the other hand, can only acquire British nationality by the deliberate assent of the government, or, if a woman, by marriage.

There is no method (save that in the exceptional case mentioned in Rule 46) under English law by which a natural-born British subject can be deprived of his British nationality. But the British Nationality and Status of Aliens Act, 1914, does provide a method by which a naturalized British subject for certain offences is liable to be deprived of British nationality, and his certificate of naturalization revoked. This revocation, it must be noted, may in certain cases take place at the mere decision of a Secretary of State without any trial of the person concerned.

The position of a person who becomes a British subject on the annexation of territory by the Crown (*p*) differs from that of a natural-born British subject, in so far as the acquisition of British nationality by him is dependent on the decision of the Crown to annex the territory. On the other hand, it differs also from the position of a naturalized British subject, since the latter must apply for naturalization, and, if he becomes a British subject, does so as the result of his desire to obtain that status, while on annexation, in the absence of special treaty stipulations, British nationality attaches to residents of the territory annexed, being subjects of the former sovereign of that territory.

(*o*) See Rule 49, p. 205, *post*.

(*p*) See Rule 26, p. 183, *ante*.

When the quality of being a British subject has been obtained by any person through annexation, that person occupies the position of a natural-born British subject for most, if not all (*q*), purposes, and certainly cannot be deprived of his nationality (subject to the case mentioned in Rule 46) by any action of the British government.

The wife of a naturalized British subject acquires British nationality by reason of her marriage to the same extent as does the wife of a natural-born British subject, and she is not a naturalized British subject (*r*). It is not possible to deprive her of British nationality for any actions done by her alone, but if her husband's certificate of naturalization is revoked she may be deprived of her British nationality under certain conditions, even if she were at birth a British subject (*s*).

RULE 33.—(1) A certificate granted under Rules 28 to 30 of this Digest creates (subject to the effect of clause 3 of this Rule) on behalf of the applicant Imperial naturalization, *i.e.*, naturalization which is valid throughout the whole of the British Empire (*t*).

(2) The government of any British possession (*u*) has (subject to the effect of clause 3 of this Rule) the same power to grant a certificate of Imperial naturalization as has the Secretary of State under Rules 28 to 30, but in the case of any British possession other than India or a self-governing Dominion (*x*) the power must be exercised with the sanction of the Secretary of State.

(3) A certificate of naturalization granted under

(*q*) Presumably, however, the special provisions as to natural-born British subjects in the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), would not apply to such a person. On the other hand he would clearly be entitled to make his will in any form under the Wills Act, 1861 (App., Note 21, *post*).

(*r*) See *Jaffé v. Keel*, [1916] 2 K. B. (C. A.) 476.

(*s*) See Rule 46, p. 203, *post*. For certain privileges of women who are born British subjects, see Rules 46 (1) and 49, pp. 203, 205, *post*.

(*t*) See British Nationality and Status of Aliens Act, 1914, s. 3.

(*u*) See the definition of British possession, p. 384, *post*.

(*x*) The Dominions of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland. See British Nationality and Status of Aliens Act, 1914, Sched. 1.

Rules 28 to 30 (*y*) has no effect within any one of the five self-governing Dominions unless the legislature of such Dominion adopts Part II. of the British Nationality and Status of Aliens Act, 1914 (*z*).

Comment.

The aim of this legislation (*a*) was the attainment of two different ends. The one was to create what is now called Imperial naturalization, *i.e.*, to confer upon a naturalized person naturalization which should be recognized throughout the whole of the British dominions, and, as far as British power could effect the result, throughout the whole world. The second object was to prevent any interference with the rights hitherto exercised by the Governments of British possessions in general and especially of each of the five self-governing Dominions of granting naturalization, valid within their territorial limits only, on such conditions as to residence, &c. as seemed fit to them. The second aim is carried out by the express enactment in the Act of 1914 (s. 26 (2)), that "All laws, statutes, and ordinances made by the legislature of a British possession for imparting to any person any of the privileges of naturalization to be enjoyed by him within the limits of that possession, shall, within those limits (*b*), have the authority of law." The former end is attained in the manner set out in the Rule. Up to 1921 only Canada, Australia and Newfoundland of the self-governing Dominions had adopted Part II. of the Act of 1914.

RULE 34.—Any person may be naturalized under a special Naturalization Act.

(*y*) See the Act of 1914, s. 8. Residence in the British possession concerned takes the place of residence in the United Kingdom as a condition of qualification under Rule 28 (2) and (6), and in any possession in which any language is recognised as on an equality with the English language (*e.g.*, French in Canada, Dutch in the Union of South Africa, Maltese in Malta) an adequate knowledge of the English language or that language is substituted for an adequate knowledge of the English language in Rule 28 (1) (*b*), p. 185, *ante*.

(*z*) See the Act of 1914, s. 9.

(*a*) Keith, Imperial Unity and the Dominions, chap. xii.

(*b*) See *R. v. Francis, Ex parte Markwald*, [1918] 1 K. B. 617; *Markwald v. Attorney-General*, [1920] 1 Ch. (C. A.) 348, which establish the strictly local character of colonial naturalization. For the purposes of international law, British protection is extended to persons naturalized only in a British possession.

Comment.

Special Acts of Parliament have occasionally been passed in recent years to confer British nationality on persons who from living abroad had accidentally under the law in force prior to the Act of 1914 lost British nationality while retaining effective connection with the United Kingdom. The necessity of such Acts will, of course, be greatly diminished by the new principles introduced by the Act of 1914 (see Rule 24).

II.—BY PERSON UNDER DISABILITY.**(1) *Annexation.***

RULE 35.—If on the acquisition of territory by the Crown, whether by annexation or cession, a national of the annexed or cessionary state becomes by virtue of the annexation or cession a British subject, every child of such person, being a minor, shall (*semble*) become a British subject.

Comment.

This Rule, with which compare Rule 26, is conjectural. It can hardly be doubted that it holds good in the case of minor children resident in the territory in question, but it may be doubted if it applies to minor children resident out of the territory.

(2) *Naturalization.*

RULE 36.—(1) When an alien obtains a certificate of naturalization the Secretary of State may, if he thinks fit, on the application of that alien, include in the certificate the name of any child of the alien born before the date of the certificate and being a minor, and that child shall thereupon if not already a British subject become a British subject.

(2) The Secretary of State may, in his absolute discretion, in any special case in which he thinks fit, grant a certificate of naturalization to any minor whether or not the conditions required by the British Nationality

and Status of Aliens Act, 1914, have been complied with.

(3) Except as provided in this Rule and in Rule 49, a certificate of naturalization shall not be granted to any person under disability (*b*).

Comment.

The first clause of this Rule prescribes the normal method in which minor children of an alien who obtains naturalization acquire British nationality. The alien must make application, if he desires this result to be achieved, and the grant of the application is entirely within the discretion of the Secretary of State. On the strict wording of the Rule it might be contended that the minor child becomes a British subject immediately on the inclusion of his name in the certificate, but it may be assumed that the correct interpretation of the provision is that this result is not attained until the alien has taken the oath of allegiance, the certificate taking no effect until the oath is taken: British Nationality and Status of Aliens Act, 1914, s. 2 (4).

The second clause confers on the Secretary of State a wide discretion likely to be of advantage in meeting cases of hardship such as those noted under Rule 25 arising from the fact that nationality is not inherited from women, or by a posthumous child.

(3) *Marriage.*

RULE 37.—The provisions of Rule 27 as to the acquisition of British nationality by marriage apply to minor children in the same manner as to persons not under disability.

Comment.

Though a woman of foreign nationality if under twenty-one years of age could not obtain a certificate of naturalization in normal circumstances, she automatically attains British nationality by marriage to a British subject, exactly as if she were not under any disability.

(*b*) British Nationality and Status of Aliens Act, 1914, s. 5.

(C) LOSS OF BRITISH NATIONALITY.

I.—BY PERSON NOT UNDER DISABILITY.

(1) *Annexation to Foreign State.*

RULE 38.—On the annexation by, or cession to, a foreign power of British territory, British subjects resident in that territory become aliens, so far as provision regarding their nationality is not made by treaty (*c*).

Comment.

In modern times cessions of British territory have always taken place under precise stipulations as to the nationality of the persons affected by the cession. The Rule, therefore, has no present practical importance.

(2) *Marriage.*

RULE 39.—A British subject who becomes the wife of an alien (1) shall be deemed to be an alien, and (2) shall not, by reason only of the death of her husband or the dissolution of her marriage, cease to be an alien (*d*).

Comment.

The first part of this Rule, which follows the terms of the Act of 1914, is somewhat curiously expressed. In the Naturalization Act, 1870, s. 10, it appears in the simpler form that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject. The explanation of the change in terminology is probably a desire to avoid ascribing to a woman a nationality which may not be her nationality under the law of the State of which her husband is a subject, as some States do not admit the principle that a wife's nationality is always

(*c*) Compare Keith, *Theory of State Succession*, pp. 42—48. See *Doe d. Thomas v. Achlam* (1824), 2 B. & C. 779, 795, per Abbott, C. J.; *Doe d. Auchmuty v. Mulcaster* (1826), 5 B. & C. 771. Similarly, on the dissolution of the union of the Crowns of the United Kingdom and Hanover in 1837 Hanoverians became aliens: *Isaacson v. Durant* (1886), 17 Q. B. D. 54, which negates the option suggested *Re Bruce* (1832), 2 C. & J. 436.

(*d*) British Nationality and Status of Aliens Act, 1914, ss. 10, 11.

that of her husband (*e*). For the purposes of English law it is normally sufficient to determine that a person is a British subject or an alien without precise ascertainment of the nationality if alien.

The second part of the Rule is silent (cf. Rule 27) as to the case in which a marriage is declared null by the Courts. Presumably the result of such a decree would be to leave the wife in possession of the nationality which she enjoyed before the celebration of the void marriage (*f*).

(3) *Naturalization in foreign country.*

RULE 40.—A British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject (*g*).

Comment.

A person not under disability may, when in a foreign State (*h*), become naturalized there by any voluntary and formal act, which achieves this end according to the law of such State, *e.g.*, by becoming naturalized in the United States. But remark that he cannot do this unless he is within the foreign State. This Rule, apparently, would render ineffective the naturalization in France of any Englishman being still in the British dominions by the vote of the French legislature, such as the votes by which French National Assemblies have on several occasions naturalized foreigners as French citizens who were not at the time in France. It appears also to be necessary that the person naturalized in the foreign State should take some part in the naturalization which proves his voluntary assent to it. Of course, the neglect of either of these conditions would not render the vote of a French legisla-

(*e*) *E.g.*, France. See *In the Goods of Brown-Séquard* (1894), 70 L. T. 811.

(*f*) Compare Rule 65, p. 300, *post*.

(*g*) British Nationality and Status of Aliens Act, 1914, s. 13.

(*h*) During war naturalization is possible in a neutral State: *Pedlar v. Johnstone*, [1920] 2 Ir. R. 450, 476. Not, however, if that State is at war with the United Kingdom: *R. v. Lynch*, [1903] 1 K. B. 444. Nor in any case so as to free him from obligations already binding on him, *e.g.*, military service. See *Dawson v. Meuli* (1918), 118 L. T. 357. See also *In re Chamberlain's Settlement* (1921), 37 T. L. R. 966.

ture turning a British subject into a French subject invalid in France, but it would prevent such vote from rendering the person so naturalized an alien in the United Kingdom.

(4) *Declaration of Alienage.*

RULE 41.—(1) Any person who by reason of his having been born within the British dominions is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may if not under any disability make a declaration of alienage, and on making the declaration shall cease to be a British subject.

(2) Any person who though born out of the British dominions is a natural-born British subject may, if not under any disability, make a declaration of alienage, and on making such declaration shall cease to be a British subject (i).

Comment.

The difference (k) of the wording of the two clauses of the Rule is due to the fact that in the case of a person born in the British dominions the existence of a double nationality is *primâ facie* improbable, while in the case of a child born out of the dominions the presumption is in favour of a double nationality. The motive of the Rule is to avoid the multiplication of persons with double nationality and, therefore, divided allegiance. But a declaration of alienage cannot be made during war (l) if the result would be to make the declarant an alien enemy, nor does it relieve a declarant from any obligation arising before the declaration is made (m).

(i) British Nationality and Status of Aliens Act, 1914, s. 14. As to disability, see *Kopelowitz v. McLaughlan* (1916), 85 L. J. K. B. 1700.

(k) See *Stoeck v. Public Trustee*, [1921] 2 Ch. 67; 37 T. L. R. 666. By a declaration under Rule (2) a man may cease to have any nationality just as a woman by marriage may lose British nationality without acquiring any foreign nationality. See Rule 39, p. 197, *ante*.

(l) *Ex parte Freyberger*, [1917] 2 K. B. (C. A.) 129.

(m) *Vecht v. Taylor* (1917), 116 L. T. 446; *Gschwind v. Huntington*, [1918] 2 K. B. 420; *Sawyer v. Kropp* (1916), 85 L. J. K. B. 1446. See also British Nationality and Status of Aliens Act, 1914, s. 16.

Illustration.

S is by English law a natural-born British subject, and according to French law either a natural-born or naturalized French citizen. *S* may have acquired the character of a British subject at birth either in the British dominions or outside the British dominions. On the other hand, *S* may have acquired the character of a French citizen either at birth or during minority. If *S* is under no disability (*i.e.*, has ceased to be a minor and is not a married woman), *S* can by a declaration of alienage become under English law an alien.

RULE 42.—Where His Majesty has entered into a convention with any foreign State to the effect that the subjects or citizens of that State to whom certificates of naturalization have been granted, may divest themselves of their status as such subjects, it shall be lawful for His Majesty by Order in Council, to declare that the convention has been entered into by His Majesty; and from and after the date of the Order any person having been originally a subject or citizen of the State therein referred to, who has been naturalized as a British subject may, within the limit of time provided in the convention, make a declaration of alienage, and on making the declaration he shall be regarded as an alien and as a subject of the State to which he originally belonged as aforesaid (*n*).

Comment.

This Rule is practically of minimal importance. The only conventions as yet made under it are those with the United States of May 13, 1870, and February 23, 1871.

RULE 43.—The child of a naturalized alien, who has become a British subject through the inclusion of his name in the certificate granted to his parent, may within one year after attaining his majority make a declaration

(*n*) British Nationality and Status of Aliens Act, 1914, s. 15, following the Naturalization Act, 1870, s. 3. See also the Naturalization Act, 1872 (35 & 36 Vict. c. 39).

of alienage, and shall thereupon cease to be a British subject (*o*).

Comment.

The requirement that the child must take action within one year after attaining his majority is curious; no such requirement is made in the case of natural-born subjects (Rule 41).

(5) *Revocation of Naturalization.*

RULE 44.—A Secretary of State is bound to revoke a certificate of naturalization where he is satisfied that the certificate was obtained by false representation or fraud or by concealment of material circumstances, or that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to the Crown; he is also bound to revoke the certificate in certain other cases specified in the British Nationality and Status of Aliens Act, 1914, s. 7, if satisfied that the continuance of the certificate is not conducive to the public good. In every case the Secretary of State may, and in most cases, if so desired by the person in question, must, refer the matter to a committee of inquiry presided over by a person who holds or has held high judicial office or to the High Court. The decision as to revocation, however, rests with the Secretary of State alone, save in the case of a certificate of Imperial naturalization granted by the government of some other part of the British dominions, in which event the concurrence of the government by which the certificate was granted is necessary for the revocation of the certificate.

Similar powers as to the revocation of Imperial certificates of naturalization are vested in the governments of British possessions, the concurrence of the Secretary of State being requisite for the revocation of any certificate granted in the United Kingdom (*p*).

(*o*) British Nationality and Status of Aliens Act, 1914, s. 5 (1).

(*p*) British Nationality and Status of Aliens Act, 1914, ss. 7, 8, 9; and see Rule 33, p. 193, *ante*.

II. BY PERSON UNDER DISABILITY.

RULE 45.—Subject to the exception to this Rule and to Rule 47, where a person being a British subject ceases to be a British subject whether by declaration of alienage or otherwise, every child of that person, being a minor, shall thereupon cease to be a British subject, unless such child, on the person ceasing to be a British subject, does not become by the law of any other country naturalized in that country (*q*).

Comment.

This Rule enunciates the general principle that the nationality of a minor child is changed when its father or widowed mother loses British nationality whether by declaration of alienage (Rules 41—43) or otherwise, *e.g.*, by naturalization in a foreign country (Rule 40), or on cession of territory (Rule 38), provided, of course, in the latter case that no provision to the contrary was made in the treaty of cession. The case of change of a widowed mother's nationality by marriage with an alien is dealt with in the Exception.

The operation of the principle is subject to the general proviso that the child retains British nationality in cases where the change of nationality on the part of his parent does not involve his (the child's) acquisition of a foreign nationality. For the right of the child on attaining majority to resume British nationality, see Rule 48.

Illustrations.

1. *A*, not being under any disability, ceases by naturalization in a foreign country to be a British subject. *S*, his son, being a minor, becomes through his father's naturalization himself naturalized in that country. *S* ceases to be a British subject.

2. The circumstances are the same as in Illustration 1, except that *A*'s naturalization does not secure for *S* naturalization in a foreign country. *S* remains a British subject (*r*).

3. *W* obtains a divorce from *H*, a British subject. *W* marries

(*q*) British Nationality and Status of Aliens Act, 1914, s. 12 (1). Compare *Atkinson v. Bury St. Edmund's Recruiting Officer*, [1917] W. N. 127; 116 L. T. 305.

(*r*) *Atkinson v. Bury St. Edmund's Recruiting Officer*, [1917] W. N. 127; 116 L. T. 305.

an alien, *A*. Her marriage has no effect on the nationality of the minor children of her marriage with *H*, their nationality being dependent on that of their father.

Exception.—Where a widow being a British subject marries an alien, any child of hers by her former husband shall not, by reason only of her marriage, cease to be a British subject, whether he is residing outside the British dominions or not(s).

Comment and Illustration.

Though the wording of this Exception, which follows the Act of 1914, is capable of improvement, the meaning is certain. *W* marries *H*, a British subject, and has a son, *S*. *H* dies, and the widow marries *A*, a Frenchman, thereby becoming an alien. *S* is a minor when *W* marries *A*. *S* remains a British subject, even if he is living in Paris with his mother and stepfather.

The word “only” in the phrase “by reason only of her marriage” is, strictly speaking, superfluous. If the widow desires to alter her child’s nationality she can do so, but only by obtaining before her remarriage naturalization in a foreign country for herself and her child.

RULE 46.—(1) Where a certificate of naturalization is revoked, the Secretary of State may by order direct that the wife and minor children (or any of them) of the person whose certificate is revoked, shall cease to be British subjects, and any such person shall thereupon become an alien, but no such order shall be made in the case of a wife who was at birth a British subject unless the Secretary of State is satisfied that if she had held a certificate of naturalization in her own right the certificate could properly have been revoked.

(2) Except where such an order is made, the wife and minor children of the person whose certificate is revoked shall not be affected by the revocation, and they shall remain British subjects.

(s) British Nationality and Status of Aliens Act, 1914, s. 12 (1), proviso.

(3) The wife of any such person may within six months after the date of the order of revocation make a declaration of alienage, and thereupon she and any minor children of her husband and herself shall cease to be British subjects and shall become aliens (*t*).

Comment.

This Rule represents an addition made in 1918 to the Act of 1914. It is remarkable in that it introduces an exception to the otherwise invariable rule (Rule 32) that the government has no power to deprive a natural-born British subject of his nationality. Under it the Secretary of State may at his discretion order that the wife or minor children born in the British dominions of a naturalized father shall cease to be British subjects. The power, however, is purely discretionary, and the Secretary of State is at liberty to treat different members of the family differently. The anomaly of the Rule is further increased by the permission given to the wife of a person whose certificate is revoked to make a declaration of alienage, though under disability.

Special protection is given to the wife if she was a natural-born British subject; no order depriving her of British nationality can be made except on grounds which would have justified the revocation of a certificate of naturalization granted to her personally (see Rule 44).

RULE 47.—When a man ceases during the continuance of his marriage to be a British subject, his wife shall thereupon cease to be a British subject, but it shall be lawful for her to make a declaration that she desires to retain British nationality, and thereupon she shall be deemed to remain a British subject (*u*).

Comment.

As a general rule the nationality of the wife follows that of the husband, but the Act of 1914 permits the wife of a British subject who becomes an alien during the continuance of their marriage to retain British nationality by making a declaration

(*t*) British Nationality and Status of Aliens Act, 1914, s. 7A.

(*u*) British Nationality and Status of Aliens Act, 1914, s. 10.

to that effect. The right, it should be noted, is in no way dependent on the national status of the wife before marriage, though it would have been natural and more logical to restrict the privilege to women who were natural-born British subjects.

Illustrations.

1. *H*, a natural-born British subject, becomes naturalized in Germany. *W*, by making a declaration of her desire to retain British nationality may remain a British subject.

2. The circumstances are as in the preceding illustration, but *W* takes no action. She therefore ceases to be a British subject.

(D) RESUMPTION OF BRITISH NATIONALITY.

RULE 48.—Any child who has ceased to be a British subject under the terms of Rule 45 may, within one year after attaining his majority, make a declaration that he wishes to resume British nationality, and shall thereupon again become a British subject (*x*).

Illustration.

A, a British subject, becomes naturalized in a foreign country, under the law of which *S*, his son, also becomes naturalized. *S* becomes an alien, but may within a year of attaining his majority resume British nationality by making a declaration.

RULE 49 —Where an alien is the subject of a State at war with the British Crown, it shall be lawful for his wife, if she was a natural-born British subject, to make a declaration that she desires to resume British nationality, and thereupon the Secretary of State, if he is satisfied that it is desirable that she may be permitted to do so, may grant her a certificate of naturalization (*y*).

Comment.

This Rule forms an exception to the general principle that certificates of naturalization are not granted to persons under dis-

(*x*) British Nationality and Status of Aliens Act, 1914, s. 12 (2).

(*y*) British Nationality and Status of Aliens Act, 1914, s. 10, proviso.

ability (Rule 36). It is, however, most appropriately classed here as it rests on a resumption of a status attained by the person concerned at birth, as in the case of Rule 48. The intervention of the Secretary of State is here required because of the danger which might be involved in permitting the wife of an alien enemy to resume at her pleasure British nationality and thus becoming exempt from disabilities imposed on alien enemies.

It does not appear to be necessary that the wife should up to the time of her marriage with an alien have remained a natural-born British subject; all that is requisite is that she should have acquired this status at birth.

Illustration.

W, a natural-born British subject, marries *H*, a German subject, in 1913. In 1914 war breaks out and *H* thus becomes a subject of a State at war with the British Crown. *W* may make a declaration of her wish to resume British nationality and the Secretary of State may grant her a certificate of naturalization.

RULE 50.—British nationality duly acquired under the law in force prior to January 1, 1915, is not affected by the changes in the law as to the acquisition of such nationality introduced by the British Nationality and Status of Aliens Act, 1914.

Comment.

While the Act of 1914 established a fresh code regulating the modes of acquiring British nationality, express provision was made by sect. 1, sub-s. 3, to leave unaltered the status already acquired by any person before the commencement of the Act, *i.e.*, January 1, 1915. The earlier rules are given at length in the second edition of this Digest, and it is only necessary to call attention to the following points of special importance.

Prior to January 1, 1915, British nationality might be inherited by a child from a paternal grandfather, born within the British dominions, provided that the child's father, though born out of the British dominions, was a natural-born British subject at the time of such child's birth (*z*). The extension of British

(*z*) See Conflict (2nd ed.), pp. 168—171.

nationality to a child by inheritance from a grandfather has now disappeared: see Rules 24 and 25 (2).

Prior to January 1, 1915, where a father or a mother, being a widow, had obtained a certificate of naturalization, any child of such father or mother, whether born before or after the naturalization of his parent, was not, if born outside the British dominions, necessarily a British subject, but might obtain British nationality by residence with his parent during infancy in the United Kingdom or with his father while in the service of the Crown out of the United Kingdom (a). Under the new rules children born before the naturalization of their parents are not British subjects unless their names are included in the parent's certificate of naturalization (b), while children born after are *eo facto* natural-born British subjects (c).

(E) STATUS OF ALIENS.

RULE 51 (d).—Real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to, an alien in the same manner in all respects as through, from, or in succession to a natural-born British subject: Provided that this Rule shall not operate so as to—

- (1) confer any right on an alien to hold real property situate out of the United Kingdom; or
- (2) qualify an alien for any office or for any municipal, parliamentary, or other franchise; or
- (3) qualify an alien to be the owner of a British ship (e); or
- (4) entitle an alien to any right or privilege as a

(a) *Ibid.*, pp. 182—184. See also *Jaffé v. Keel*, [1916] 2 K. B. (C. A.) 476.

(b) See Rule 36 (1), p. 195, *ante*.

(c) See Rule 24, p. 176, *ante*.

(d) British Nationality and Status of Aliens Act, 1914, s. 17.

(e) As to ownership of ships by companies under alien control, compare *The Tommi*, [1914] P. 251, 263, 264; *The Polzeath*, [1916] P. (C. A.) 246. See the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1 (d).

British subject except such rights and privileges in respect of property as are hereby expressly given to him ; or

- (5) affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before May 12, 1870, or in pursuance of any devolution by law on the death of any person dying before that day.

Comment.

It is uncertain how far the first clause of the Rule, preceding the proviso, is affected in its generality by clause 4 of the proviso. Thus is it the case that the Rule is sufficiently wide in its terms to bring an alien within the operation of the Wills Act, 1861, ss. 1 and 2, so as to enable him to dispose by will of personal estate in all the forms which that enactment renders available to a British subject? It is probable that the Courts may hold (*f*) that the effect of the proviso is to leave the Wills Act applicable to British subjects only, but the point is open to much doubt.

A further question arises as to the effect of the Rule beyond the limits of the United Kingdom. The fact that the provision is enacted in Part III., "General," of the British Nationality and Status of Aliens Act, 1914, and the terms of clause 1 of the proviso, indicate that the enactment is intended to apply throughout the British dominions. If so, any legislation by the legislature of a British possession restricting the rights granted to aliens by the enactment would be void for repugnancy. It is, however, probable that, under sect. 26 (1) of the Act or otherwise, the Courts will find it possible so to interpret the Act as to avoid any interference with the freedom of colonial legislation (*g*).

The result of the war in Europe is seen in the restriction of the freedom accorded between 1870 and 1914 to aliens to enjoy property and personal rights of the widest character in England. The Aliens Restriction (Amendment) Act, 1919 (*h*), not only con-

(*f*) See *Bloxam v. Favre* (1884), 9 P. D. (C. A.) 130; *In Goods of Von Buseck* (1881), 6 P. D. 211; decided on the Naturalization Act, 1870, s. 2.

(*g*) Cf. Keith, *Imperial Unity and the Dominions*, p. 253.

(*h*) 9 & 10 Geo. 5, c. 92.

fers upon the Government power to deport former enemy aliens, but it forbids their admission without special permission for a period of three years from the passing of the Act (December 23, 1919) and their acquisition for that period of any land or any interest in land in the United Kingdom; any interest in a key industry or any share or interest in a share in a company registered in the United Kingdom carrying on a key industry; and any share, or interest in a share, in a company owning a British ship registered in the United Kingdom. The Board of Trade is authorized to decide what are key industries, and tenancies for a period not exceeding three years at a rack rent are permitted (*i*). The term "former enemy alien" denotes any person who is a subject or citizen of the German Empire or any component State, or of Austria, Hungary, Turkey or Bulgaria, or who, having at any time been such subject or citizen, has not changed his allegiance as the result of the recognition of new States or territorial rearrangements, or been naturalized in any other foreign State or in any British possession in accordance with the laws thereof and when actually resident therein, and does not retain according to the law of his State of origin the nationality of that State. But the restrictions mentioned above do not apply to a woman being a foreign enemy alien, who at the time of her marriage was a British subject (*k*).

Permanent restrictions are also imposed by the Act. No former enemy alien shall be employed or shall act as master, officer or member of the crew of a British ship registered in the United Kingdom (*l*). No alien shall hold a pilotage certificate for any pilotage district in the United Kingdom (*m*). No alien shall act as master, chief officer or chief engineer of a British merchant ship registered in the United Kingdom, or as skipper or second hand of a fishing boat so registered, except in the case of a ship or boat engaged habitually in voyages between ports outside the United Kingdom, an exception being made in favour of aliens who served in such capacities during the war and rendered good and faithful service. No alien may be employed in any capacity on board a British ship registered in the United Kingdom until he has produced satisfactory proof of his nationality, and he must

(*i*) 9 & 10 Geo. 5, c. 92, ss. 9—11.

(*k*) *Ibid.*, s. 15.

(*l*) *Ibid.*, s. 12.

(*m*) *Ibid.*, s. 4, with a small exception for French ships entering Newhaven or Grimsby.

not be employed at a rate of pay below that current on British ships for his rating (*n*).

No alien may be appointed after December 23, 1919, to any office or place in the Civil Service (*o*), and, although eligible for jury service, he may not sit if challenged by any party (*p*).

No alien may assume, or continue to use, after December 23, 1919, any name other than that by which he was ordinarily known on August 4, 1914, except with the express permission of the Secretary of State. The rule applies to any alien who by himself or as a partner carries on any business in a name other than that by which it was known on August 4, 1914. But it does not prevent the use of a name by royal licence, or of her husband's name by a wife, or of a name assumed before December 23, 1919, by an alien who was granted exemption under the terms of the Defence of the Realm Regulations or the Aliens Restriction Order in force on January 1, 1919 (*q*).

The Companies (Foreign Interests) Act, 1917, imposes certain restrictions upon companies with the intention of preventing aliens obtaining control of them in cases where such control might be dangerous (*r*). Where any provision in the articles of association of a registered or incorporated company restricts the power of aliens to control the company (*e.g.*, by limiting the amount of capital which aliens may hold, or their voting power or right to act as directors), then no alteration of such a provision can be made without the consent of the Board of Trade, and the Board's decision as to whether any alteration requires their assent shall be final. No company subject to such restrictions may be voluntarily wound up without the consent of the Board, and the Court which has jurisdiction to make a winding-up order has absolute discretion to refuse to make such an order, but the Board and the Court must be guided by the consideration whether the winding up is *bonâ fide* for the discontinuance of the business or with a view to the continuance of the undertaking free from any restriction as to alien control. In consenting to a winding up the Board or the Court may impose such conditions for giving effect to the Act as it thinks fit (*s*).

(*n*) 9 & 10 Geo. 5, c. 92, s. 5.

(*o*) *Ibid.*, s. 6.

(*p*) *Ibid.*, s. 8.

(*q*) *Ibid.*, s. 7.

(*r*) 7 & 8 Geo. 5, c. 18, s. 1.

(*s*) *Ibid.*, s. 2.

In addition to legislation during the war for the control and liquidation of enemy businesses, the Trading with the Enemy Amendment Act, 1918 (8 & 9 Geo. 5, c. 31), s. 2, which is to be in force for a period of five years after the termination of the war and thereafter until Parliament otherwise determine, prohibits a firm or individual whose business is carried on wholly or mainly for the benefit of, or under the control of enemy subjects, or an enemy-controlled corporation, from carrying on banking business in the United Kingdom. For the purpose of this enactment an enemy is a person possessing the nationality of a State at war with His Majesty, or a body corporate constituted according to its laws (*t*), while an enemy-controlled corporation (*u*) is one in which subjects of a State at war with the United Kingdom on August 8, 1918, constitute the majority of the directing body, or hold the majority of the shares or voting power themselves or by nominees, or control the corporation by any means whatever, or one of which the executive is an enemy-controlled corporation, or of which the majority of the executive are appointed by an enemy-controlled corporation.

(*t*) See Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), s. 15.

(*u*) 8 & 9 Geo. 5, c. 31, s. 13. For other disabilities on former enemy aliens, see the Non-Ferrous Metal Industry Act, 1918 (7 & 8 Geo. 5, c. 67), and the British Ships (Transfer Restriction) Acts, 1915 and 1916 (5 Geo. 5, c. 21, and 6 & 7 Geo. 5, c. 42).

BOOK II.

JURISDICTION.

THE subject of Book II. is Jurisdiction (*a*).

The Rules contained in Book II. deal with two different matters.

The first matter is the jurisdiction, in cases which contain any foreign element (*b*), of the High Court of Justice.

Under this head are to be considered two different though closely connected questions. The first is, what are, according to English law, the limits to the jurisdiction of the High Court in cases which contain any foreign element, or, in other words, what are the cases containing a foreign element which the High Court has, according to English law, a right to determine or adjudicate upon? The second question is, what are, as far as English Courts can decide the matter, the extra-territorial effects of the exercise of jurisdiction by the High Court?

The second matter is the jurisdiction of Foreign Courts.

Under this head again are to be considered two different though closely connected questions. The first is, what are, according to English law, the proper limits to the jurisdiction of foreign Courts; or, in other words, what are the cases which the Courts of a foreign country have, according to English law, a right to determine or adjudicate upon? The second question is, under what circumstances, and how far, the High Court will give effect in England to the exercise of jurisdiction by the Courts of a foreign country in the form either of judgments or otherwise; or, in other words, what is the effect in England of foreign judgments, or of foreign proceedings, such as sentences of divorce, or adjudications of bankruptcy, which resemble judgments?

Hence Book II. is divided into two Parts.

(*a*) See Intro., pp. 2, 3, 40—59, *ante*.

(*b*) See Intro., pp. 1, 2, *ante*.

Jurisdiction of High Court.—Part I. (c) deals with the jurisdiction of the High Court. The Rules contained therein define the limits within which, in cases containing any foreign element, the High Court can exercise jurisdiction (d); they also define the extra-territorial effect, so far as it depends on English law, of the exercise of jurisdiction by the High Court (e).

The word "jurisdiction" is throughout this Digest used as meaning "the right or authority of a Court"; the word is not therein used as meaning "the area over which a Court has jurisdiction," i.e., over which it has authority to enforce its judgments. This matter deserves attention, since the term "jurisdiction" is more often than not used in English text-books, judgments, and statutes as meaning the "area of territory over which a Court has jurisdiction" (f).

Jurisdiction of Foreign Courts.—Part II. (g) deals with the jurisdiction of Foreign Courts. .

The Rules contained therein define the cases in which (according to the principles recognised by English law) the Courts of a foreign country have a right to exercise jurisdiction (h), i.e., are Courts of competent jurisdiction (i).

The Rules contained in Part II. also define the effect in England of the exercise of jurisdiction by Foreign Courts (k).

(c) Chaps. iv. to xi.

(d) See chaps. i. to x.

(e) See chaps. x., xi.

(f) This is the case, for instance, in Ord. XI. r. 1. This rule is in substance embodied in the Exceptions to Rule 60, *post*, but in these Exceptions for the word "jurisdiction" is substituted "England," e.g., for the words "land situate within the jurisdiction" is substituted "land situate in England."

For a contrast between the two meanings of the word "jurisdiction," compare *In re Smith* (1876), 1 P. D. 300, 301, judgment of Sir R. Phillimore; *The Vivar* (1876), 2 P. D. (C. A.) 29, 32; *Cookney v. Anderson* (1862), 31 Beav. 452, 462, judgment of Romilly, M. R.; *Tassell v. Hallen*, [1892] 1 Q. B. 321, 323, judgment of Coleridge, C. J.

(g) Chaps. xii. to xviii.

(h) See chaps. xii. to xvi.

(i) See as to Courts of competent jurisdiction, Intro., p. 40, note (o), and pp. 41, 42, *ante*, and Rule 91, *post*. The Courts, be it noted, of countries other than England, which form part of the British dominions are, for most purposes, to be considered "foreign" Courts, and our judges, in fixing the limits of the jurisdiction properly exerciseable, e.g., by a Victorian Court, will, in general, deal with the matter exactly as they would if Victoria were a foreign country in the ordinary sense of the term. As to meaning of "foreign," see p. 71, *ante*, and as to meaning of "British dominions," see p. 68, *ante*.

(k) See chaps. xvii. and xviii.

Inquiries, however, as to the jurisdiction properly exercisable by the Courts of a foreign country and its effect in England always, or nearly always, come before English judges in the form of inquiries as to the effect to be given in England to a foreign judgment, or to some proceeding such as an adjudication in bankruptcy which partakes to a certain extent of the nature of a judgment. If we for the moment, therefore, give a wide sense to the term "foreign judgment," it may be laid down with substantial accuracy that Part II. treats of Foreign Judgments.

PART I.

JURISDICTION OF THE HIGH COURT.

CHAPTER IV.

GENERAL RULES AS TO JURISDICTION.

(A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In respect of Persons.*

RULE 52.—The Court has (subject to the exceptions hereinafter mentioned) no jurisdiction (*a*) to entertain an action (*b*) or other proceeding against—

(1) any foreign sovereign (*c*);

(*a*) To the persons enumerated in this Rule might, from one point of view, be rightly added the Crown itself, since an *action* cannot be brought against the Crown, nor can an action *in rem* be brought against any ship of the Royal Navy or the Crown (*The Broadmayne*, [1916] P. (C. A.) 64; *Young v. S.S. Scotia*, [1903] A. C. 501). But the Crown is purposely omitted because proceedings can in effect be under certain circumstances brought in the High Court against the Crown in the form of a petition of right (see especially, Clode, *Petition of Right*, pp. 66, 67; Com. Dig., “*Action*,” c. 1; and (among other cases) *Canterbury v. Attorney-General* (1843), 1 Phillips, 306, 322; *Thomas v. The Queen* (1874), L. R. 10 Q. B. 31; *Rustomjee v. The Queen* (1876), 1 Q. B. D. 487; 2 Q. B. D. (C. A.) 69; *Windsor & Annapolis Rail. Co. v. The Queen* (1886), 11 App. Cas. 607; *Tobin v. The Queen* (1864), 16 C. B. (N. S.) 310; 33 L. J. C. P. 199; and compare *Hosier Bros. v. Derby*, [1918] 2 K. B. (C. A.) 671; *Bombay & Persia Steam Navigation Co. v. Maclay*, [1920] 3 K. B. 402, 406—408, per Rowlatt, J.), and this work is not concerned with the technical rules which merely govern the practice of the High Court.

(*b*) The word “*action*” has in these Rules the meaning given it by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 100, taken together with Ord. I. r. 1.

(*c*) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149. The Court takes judicial cognizance not only of the status but also of the boundaries of a foreign State, and if in doubt will apply for information to the Secretary of State for Foreign Affairs, whose answer is conclusive. *Foster v. Globe Venture Syndicate*, [1900] 1 Ch. 811; *Taylor v. Barclay* (1828), 2 Sim. 213; 29 R. R.

- (2) any ambassador or other diplomatic agent (*d*) representing a foreign sovereign and accredited to the Crown (*e*);
- (3) any person belonging to the suite of such ambassador or diplomatic agent (*f*).

An action or proceeding against the property of any of the persons enumerated in this Rule is, for the purpose of this Rule, an action or proceeding against such person (*g*).

Comment.

(1) *Foreign sovereign*.—No action or other proceeding can be taken in the Courts of this country against a foreign sovereign (*h*), nor can the property of a foreign sovereign be seized or arrested (*i*).

82. A difficulty may arise as to how far a provisional government existing during a period of revolution ought to be treated as a sovereign power. *Seemle*, that any Government is to be treated as sovereign which is unmistakably and fully recognised as fully sovereign by the Crown. See *The Gagara*, [1919] P. (C. A.) 95; *The Annette*, *ibid.*, 105. But the Court will not treat as sovereign any Government not unmistakably recognised as sovereign by the Crown. In other words, the recognition must be known to the judges on the authority, *e.g.*, of the Foreign Secretary of State. *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1920), 37 T. L. R. 282; [1921] 1 K. B. 456; (C. A.) 37 T. L. R. 777. The High Court will normally only decide questions between the rights of private persons in respect to foreign ships where the sovereign to whom the ship is subject desires, or does not object to, the decision. See especially, *Statham v. Statham*, [1912] P. 92, as to the degree of sovereignty which confers immunity.

(*d*) See Hall, *International Law* (7th ed.), p. 186, and 7 *Anne*, c. 12.

(*e*) *Parkinson v. Potter* (1885), 16 Q. B. D. 152; *Taylor v. Best* (1854), 14 C. B. 487; 23 L. J. C. P. 89; *Magdalena, &c. Co. v. Martin* (1859), 2 E. & E. 94; *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533; [1894] 2 Q. B. (C. A.) 352.

(*f*) *Parkinson v. Potter* (1885), 16 Q. B. D. 152; *Fisher v. Begrez* (1832), 1 Cr. & M. 117; *Novello v. Toogood* (1823), 1 B. & C. 554, 562; *Macartney v. Garbutt* (1890), 24 Q. B. D. 368; *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533; [1894] 2 Q. B. (C. A.) 352.

(*g*) *The Parlement Belge* (1880), 5 P. D. (C. A.) 197; *The Porto Alexandre*. [1920] P. (C. A.) 30.

(*h*) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149; *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533. Compare *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1; (1848), 2 H. L. C. 1; *Wadsworth v. Queen of Spain* (1851), 17 Q. B. 171; 20 L. J. Q. B. 488; *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656; 16 L. J. Q. B. 300; *The Jassy*, [1906] P. 270; *Statham v. Statham*, [1912] P. 92.

(*i*) *The Parlement Belge* (1880), 5 P. D. (C. A.) 197. Whether the privilege of a sovereign, not to be sued for acts done in his private capacity whilst a sovereign, continues after he has ceased, *e.g.*, by abdication, to be a sovereign? Presumably not. Compare *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.)

The immunity of a foreign sovereign extends not merely to matters affecting such a sovereign in his personal capacity (if any); but to all suits of whatever nature. Moreover, the immunity is not affected by the fact that the foreign sovereign acts through an agent, even if that agent has in his hands funds belonging to the sovereign against which execution could issue in the event of judgment being given against the agent in respect of the transaction in which he has acted on behalf of the sovereign (*k*). Nor can jurisdiction be exercised against a sovereign by the service of a writ upon an ambassador (*l*).

The immunity, moreover, applies to the property of the sovereign to the fullest extent provided that the property is shown to belong to the sovereign (*m*), and not to be subject to any assignment or trust in favour of other persons within the jurisdiction of the Court (*n*).

(2) *An ambassador, &c.*—An ambassador or other diplomatic agent accredited to the Crown by a foreign State cannot, at any rate without his sovereign's consent (*o*), be made defendant here in an action either for breach of contract or, it would seem, for tort, nor can his property be seized (*p*).

149, 156, judgment of Wills, J., and *Musurus Bey v. Gaddan*, [1894] 1 Q. B. 533; *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656; *Suarez v. Suarez*, [1917] 2 Ch. 131; [1918] 1 Ch. 176.

(*k*) See *Morgan v. Larivière* (1875), L. R. 7 H. L. 423; *Twycross v. Dreyfus* (1877), 5 Ch. D. (C. A.) 605, 616—618. Compare Rule 57, p. 239, *post*.

(*l*) *Stewart v. Bank of England* (1876), W. N. 263; compare *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495; *Sloman v. Governor and Government of New Zealand* (1876), 1 C. P. D. (C. A.) 563. If the Court in the exercise of its jurisdiction in respect of immovables or movables situate in England (Rule 57, p. 239, *post*) were to deal with any property in which a foreign sovereign was interested, it would be appropriate to give notice of the proceedings to that sovereign through the ambassador. Compare *Larivière v. Morgan* (1872), L. R. 7 Ch. 550.

(*m*) In *Vavasour v. Krupp* (1878), 9 Ch. D. (C. A.) 351, it was held that the Mikado of Japan was entitled to remove from England shells manufactured in Germany which were in England pending their removal to Japan, and which were alleged to have been manufactured by a process which, if used in England, would have violated the plaintiff's patent rights. Compare *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1921), 37 T. L. R. (C. A.) 777, 782, 783, per Scrutton, L. J.

(*n*) Compare *Morgan v. Larivière* (1875), L. R. 7 H. L. 423, 430, per Lord Cairns. In *Marshall v. Grinbaum* (1921), 37 T. L. R. 913, it was held that holders of Russian credit notes had no charge on the Russian gold reserve which could be enforced against part of that reserve in the custody of the Bank of England.

(*o*) Compare Exception 1, p. 220, *post*.

(*p*) Compare *Taylor v. Best* (1854), 14 C. B. 487, 521, 522, judgment of

The Court, however, has jurisdiction over an ambassador or diplomatic agent of a foreign sovereign who is not accredited to the Crown, but is in England (*q*).

(3) *Members of suite, &c.*—The privilege of the ambassador or diplomatic agent extends to “all persons associated in the performance of the duties of an embassy or legation. . . . And if it be once ascertained that the person was treated at the embassy or legation as a member of the same, and employed from time to time in the work of the legation, the Court will not curiously measure the quantum of the services either required from or rendered by him. But the service must be *bonâ fide*” (*r*).

Thus a *chargé d'affaires* (*s*), a secretary (*t*), or a chorister *bonâ fide* employed in the chapel of an embassy (*u*), is privileged. But the privilege is that of the ambassador or diplomatic agent (*x*).

Illustrations.

1. *X* is a foreign sovereign. *X* while on a visit to England incurs debts. The Court has no jurisdiction to entertain an action for recovery of the debts (*y*).

2. *X* is a foreign sovereign. He is living in England *incognito* under the name of *Y*. Whilst in England, and passing as a

Jarvis, C. J., and 423—425, judgment of Maule, J., with *Magdalena Co. v. Martin* (1859), 2 E. & E. 94, 113, 114, judgment of Court commenting upon *Taylor v. Best*. See *In re Republic of Bolivia Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139, in which case the privilege of a diplomatic agent is extended to the utmost degree. How far it can be waived is discussed in *Suarez v. Suarez*, [1918] 1 Ch. (C. A.) 176. The privilege does not extend to exempt from legacy duty bequests by a diplomatic agent who dies domiciled in England. *Attorney-General v. Kent* (1862), 31 L. J. Ex. 391.

(*q*) But see an opposite opinion expressed; Nelson, p. 403, and compare *New Chile Co. v. Blanco* (1888), 4 T. L. R. 346. This case only decides that as a matter of discretion the Court will not allow service of a writ out of England on the representative of a foreign State accredited to a foreign State.

(*r*) Nelson, p. 400. See *Parkinson v. Potter* (1885), 16 Q. B. D. 152; *Poitier v. Groza* (1749), 1 W. Bl. 48.

(*s*) *Taylor v. Best* (1854), 14 C. B. 487.

(*t*) *Hopkins v. De Robeck* (1789), 3 T. R. 79.

(*u*) *Fisher v. Begrez* (1832), 1 Cr. & M. 117; 2 L. J. Ex. 13.

(*x*) Compare Hall (7th ed.), pp. 185—195. The ambassador must, to secure the privilege, notify to the British Government the list of the personnel of the embassy. Compare *Mr. Chance's Case*, Journal of Comp. Leg., xviii. (1918); 279.

(*y*) See *Duke of Brunswick v. King of Hanover* (1848), 2 H. L. C. 1; *Wadsworth v. Queen of Spain* (1851), 17 Q. B. 171; 20 L. J. Q. B. 488. Compare *Munden v. Duke of Brunswick* (1847), 10 Q. B. 656; 16 L. J. Q. B. 300.

British subject, he makes a promise of marriage to *A*, an Englishwoman, who has no knowledge that *X* is a foreign sovereign. *X* breaks his promise of marriage. *A* brings an action against *X*, who pleads that he is a sovereign. The Court has no jurisdiction to entertain the action (*z*).

3. An unarmed packet-boat belonging to the King of Belgium, and in the hands of officers employed by him, carries the mails from Belgium to England. The ship also carries merchandise. She negligently runs down an English boat in Dover Harbour. The Court has no jurisdiction to entertain an action against the ship, or to give any redress whatever (*a*).

4. *X* is the ambassador accredited to the Crown by a foreign State. *X* is indebted to an English company for a call due on shares. The Court has no jurisdiction to entertain an action for the amount of the call (*b*).

5. *X* is a British subject. He is accredited to the Crown as Secretary to the Chinese Embassy. His household furniture in London cannot be seized for the non-payment of parochial rates (*c*).

6. *X* is the *attaché* of a foreign embassy. He is the lessee of a dwelling-house in London. An action is brought against him by the lessor for the non-payment of rent. The Court has no jurisdiction (*d*).

7. *X* is ambassador from the King of Italy to the French Republic. He visits England and incurs debts here, for which an action is brought. *Semble*, the Court has jurisdiction (*e*).

(*z*) *Mighell v. The Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149.

(*a*) *The Parlement Belge* (1880), 5 P. D. (C. A.) 197. See *The Constitution* (1879), 4 P. D. 39; *Young v. S.S. Scotia*, [1903] A. C. 501; *The Porto Alexandre*, [1920] P. (C. A.) 30. These cases overrule *The Charkieh* (1873), L. R. 4 A. & E. 59, 120.

(*b*) *Magdalena Co. v. Martin* (1859), 2 E. & E. 94; 28 L. J. Q. B. 310; *Taylor v. Best* (1854), 14 C. B. 487; 23 L. J. C. P. 89.

(*c*) *Macartney v. Garbutt* (1890), 24 Q. B. D. 368. Contrast *In re Cloete* (1891), 65 L. T. (C. A.) 102, where a British subject's appointment as a member of legation had not been recognised by the British Government, and had been obtained merely to defeat his creditors.

(*d*) See *Parkinson v. Potter* (1885), 16 Q. B. D. 152, which, though it only decides that the *attaché* is not liable to pay rates in respect of the house which he occupies, lays down his exemption from the civil jurisdiction of the Courts in the widest terms. Compare *Musurus Bey v. Godban*, [1894] 1 Q. B. 533.

(*e*) When in this Digest, or in any Illustration, it is stated that the Court "has jurisdiction" or "has no jurisdiction," what is meant is that the Court has jurisdiction or has no jurisdiction (as the case may be) in respect of the

Exception 1.—The Court has jurisdiction to entertain an action against a foreign sovereign or (*semble*) an ambassador, diplomatic agent, or other person coming within the terms of Rule 52 (2) and (3), if such foreign sovereign, ambassador, or other person, having appeared before the Court voluntarily, waives his privilege and submits to the jurisdiction of the Court (*f*).

Comment.

A foreign sovereign can submit to the jurisdiction of the Court.

“Suppose,” asks Maule, J., “a foreign sovereign in this country were desirous to have some question decided by the Courts of this Kingdom, could he not do so?” (*g*). This question must clearly be answered in the affirmative.

This submission must be an unmistakable election to submit to the Court’s jurisdiction, and must take place at the time when the Court is about, or is being asked, to exercise jurisdiction over him (*h*).

The principles applicable to submission by a sovereign to the jurisdiction of the Court probably apply to the like submission by an ambassador (*i*), or other diplomatic agent accredited

matter (*e.g.*, to entertain an action) to which the particular Rule, Exception or Illustration refers.

(*f*) See *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 157, 160, judgments of Esher, M. R., and of Lopes, L. J.; *Parkinson v. Potter* (1885), 16 Q. B. D. 152. But conf. *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533, judgment of Wright, J. This, of course, is an application of Rule 56, p. 235, *post*, but is more conveniently treated of with special reference to Rule 52, p. 215, *ante*. See on the whole topic, *Suarez v. Suarez*, [1917] 2 Ch. 131; [1918] 1 Ch. (C. A.) 176. This case seems to decide that the result of an action against an ambassador, *e.g.*, seizure of his goods, cannot without his assent be enforced as long as he continues to hold that position.

(*g*) *Taylor v. Best* (1854), 23 L. J. C. P. 89, 93, per Maule, J.

(*h*) *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 159, judgment of Esher, M. R. Compare Hall (7th ed.), pp. 179, 180, n. 1.

(*i*) It may, however, be argued that an action can under no circumstances be maintained in England against an ambassador, &c.; for the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), “prohibits and makes null and void the issue of any writ or process against an ambassador, and not merely writs or processes in the nature of writs of execution.” *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533, 542, *per curiam*, compared with *Magdalena Steam Co. v. Martin* (1859), 2 E. & E. 94; 28 L. J. Q. B. 310. The suggested argument is inconsistent

to the Crown, but the submission requires the assent of the sovereign (*k*), to whom the privilege really appertains.

Question.—*Has the Court jurisdiction to entertain a counter-claim against a foreign sovereign or an ambassador?*

The answer to our inquiry is this: A sovereign or ambassador who brings an action in the High Court undoubtedly submits himself to its jurisdiction in regard to that action (*l*), but no further. This principle decides the extent to which the Court has jurisdiction to entertain a counter-claim against, *e.g.*, an ambassador who is plaintiff in an action. If the counter-claim is really a defence to the action, *i.e.*, is a set-off, or something in the nature of a set-off, the Court has a right to entertain it. If the counter-claim is really a cross-action, the Court has no jurisdiction to entertain it.

Illustrations.

1. *X* is a foreign sovereign. Whilst living *incognito* in England under the name of *Y*, he incurs debts to *A*, who brings an action against *X* under his proper name and description. *X* accepts service of the writ, and defends the action on its merits. In the course of the evidence it is shown that *X* is a foreign sovereign. The Court has jurisdiction (*m*).

with *Taylor v. Best* (1854), 14 C. B. 487. (Compare, especially, *Ibid.*, 522, 523, judgment of Jervis, C. J.) But it is strengthened by the language of the Court in *Musurus Bey v. Gadban*, [1894] 2 Q. B. (C. A.) 352, 357, judgment of A. L. Smith, L. J., and 360—362, judgment of Davey, L. J. See also *In re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139; *Suarez v. Suarez*, [1917] 2 Ch. 131, 138, per Eve, J. But *Taylor v. Best* is approved in *Suarez v. Suarez*, [1918] 1 Ch. (C. A.) 176, 191—194, per Swinfen Eady, L. J.; 195—198, per Warrington, L. J.

The Statute of Limitations does not run against a diplomatic agent who contracts a debt in England during his tenure of office, nor (*semble*) for a reasonable time after the end of such tenure. *Musurus Bey v. Gadban*, [1894] 1 Q. B. 533; [1894] 2 Q. B. (C. A.) 352.

(*k*) *In re Republic of Bolivia Exploration Syndicate*, [1914] 1 Ch. 139, 144—157; *Suarez v. Suarez*, [1918] 1 Ch. (C. A.) 176, where consent was proved.

(*l*) *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190, and [1897] 2 Ch. (C. A.) 487. Compare *Yorkshire Tannery v. Eglinton Chemical Co.* (1884), 54 L. J. Ch. 81, 83, judgment of Pearson, J. The same principle applies in any case where a person not otherwise subject to the jurisdiction of the Court brings an action. See Rule 56, p. 235, *post*.

(*m*) Compare *Mighell v. Sultan of Johore*, [1894] 1 Q. B. (C. A.) 149, 159, judgment of Esher, M. R. See, however, *Imperial Japanese Government v. P. & O. Co.*, [1895] A. C. 644, which, however, turned on the limited jurisdiction of the Consular Court, and not on the issue of sovereignty.

2. *X* is an ambassador accredited by the King of Italy to the Crown. *A* brings an action against *X* for an alleged debt of 10*l.* *X* accepts service, does not raise the defence that the Court has no jurisdiction, and defends the case on the merits. *Semble*, the Court has jurisdiction (*n*).

3. *A* is the minister of the French Republic accredited to the Crown. *A* brings an action against *X* for a debt of 100*l.* *X*, in his counter-claim, claims 100*l.* due to him as a debt from *A*. The Court (*semble*) has jurisdiction to entertain the counter-claim.

4. The circumstances are the same as in Illustration No. 3, except that *X*'s counter-claim is a claim for damages against *A* in respect of a libel by *A* upon *X*. The Court has no jurisdiction to entertain the counter-claim (*o*).

Exception 2.—The Court has jurisdiction to entertain an action against a person belonging to the suite of an ambassador or diplomatic agent, if such person engages in trade.

Comment.

Under the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), s. 5, it is provided that "no merchant or other trader whatsoever, within the description of any of the statutes against bankrupts, who hath or shall put himself into the service of any such ambassador or public minister, shall have or take any benefit by this Act;" and apparently the result is that the privilege of exemption from being sued, which is possessed by the servant of an ambassador, is lost by the circumstance of trading (*p*).

(*n*) See note (*i*), p. 220, *ante*.

(*o*) See *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1898] 1 Ch. 190, and [1897] 2 Ch. (C. A.) 487; *Strousberg v. Republic of Costa Rica* (1880), 29 W. R. 125. *Ghikis v. Musurus* (1909), 25 T. L. R. 225, Parker, J. Wife of ambassador to this country who resides with her husband at embassy is not "ordinarily resident within the jurisdiction" within the meaning of Ord. XI. r. 1 (*e*), p. 258, *post*.

(*p*) Compare Hall (7th ed.), pp. 188, 189. This section was not apparently cited in *re Cloete* (1891), 65 L. T. (C. A.) 102. Compare *Novello v. Toogood* (1823), 1 B. & C. 554.

(ii) *In respect of Subject-Matter.*

RULE 53.—Subject to the exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for

- (1) the determination of the title to, or the right to the possession of, any immovable situate out of England (foreign land) (*q*), or
- (2) the recovery of damages for trespass to such immovable (*r*).

Comment.

This Rule is now well established, and, whatever be its historical origin,—a matter still open to discussion,—is on the whole in conformity with that “principle of effectiveness” which, as already explained (*s*), forbids a Court to give judgments which it cannot render effective, or which it can render effective only by interfering with the authority of a foreign sovereign or the jurisdiction of a foreign Court.

As to clause 1.—The principle of effectiveness amply justifies, even though it may not historically account for, the refusal of English judges to adjudicate upon the title to, or the right to the possession of, foreign land.

As to clause 2.—Respect for the principle of effectiveness does not, it may be said, require or justify the refusal on the part of English judges to entertain actions for such injuries to foreign land as admit of compensation in damages (*t*). This remark,

(*q*) *Mostyn v. Fabrigas* (1774), Cowp. 161; *In re Hawthorne* (1883), 23 Ch. D. 743; *Companhia de Moçambique v. British S. Africa Co.*, [1892] 2 Q. B. (C. A.) 358 (especially p. 413, judgment of Fry, L. J.); *Boyse v. Colclough* (1854), 1 K. & J. 124; *Pike v. Hoare* (1763), 2 Eden, 182.

See, on the whole subject of actions in respect of foreign land, Story, ss. 554, 555; Foote (4th ed.), pp. 178—193; *Penn v. Baltimore* (1750), 1 Ves. 444; 2 Wh. & Tu. (2nd ed.) 767; *Mostyn v. Fabrigas* (1774), 1 Sm. L. Cas. (9th ed.) 628.

(*r*) *British S. Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602; *Doulson v. Matthews* (1792), 4 T. R. 503; 2 R. R. 448; *Deschamps v. Miller*, [1908] 1 Ch. 856, 863, judgment of Parker, J.

(*s*) See Intro., General Principle No. III., p. 40, *ante*.

(*t*) In *The M. Moxham* (1876), 1 P. D. 107, a case where damages were claimed in respect of a collision between a British ship and a pier in Spain, jurisdiction was exercised on the basis of an agreement that the dispute should be tried in England: p. 109, per James, L. J. But this case cannot now be regarded as an authority.

however, is more plausible than sound. It is impossible to keep an action for trespass to land free from questions as to the title to the land; and injustice (*u*) would often ensue were our Courts to give damages for trespass to land in cases in which they could not deal with the right to the ownership or the possession of the land. The refusal, therefore, to entertain any action whatever with regard to foreign land is, whatever its origin, a legitimate application or extension of the principle of effectiveness.

This Rule does not prevent the Court from entertaining an action for a breach of contract, whether express or implied, with regard to foreign land, and hence the Court may sometimes entertain actions which look at first sight very like proceedings for damage done to foreign land, or to a foreign immovable. Thus if *X*, a British subject domiciled in England, becomes tenant of a house in France, it may well be an express or implied term of the contract between *X* and *A*, his landlord, that *X* shall make good any damage caused to the house through the negligence of *X*. The house is burnt down through *X*'s negligence. The Court has jurisdiction to entertain an action by *A* against *X* for the damage done to the house through *X*'s negligence, *i.e.*, for breach of contract.

Illustrations.

1. *A* brings an action to obtain possession of lands in Canada. The Court has no jurisdiction (*x*).

2. The title to a house at Dresden is in dispute between *X* and *A*. *X* sells the house, receives part of the purchase-money, and takes a mortgage for the balance. *X* and *A* are both in England. *A* brings an action against *X* to make him account for the purchase-money. The Court has no jurisdiction (*y*).

3. Action by *A*, a foreigner, against *X*, a foreigner, and against *Y & Co.*, an English company formed for working a Russian mine, to restrain the English company from paying to *X* part of the

(*u*) Compare *British S. Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, 625, judgment of Herschell, C.

(*x*) *Doulson v. Matthews* (1792), 4 T. R. 503; 2 R. R. 448; *Roberdeau v. Rouse* (1738), 1 Atk. 543. Compare General Principle No. II. (C), p. 34, *ante*. We have here an illustration of the maxim that it is not the duty, as it is not within the power, of an English Court to enforce obedience to the law of a foreign country in such foreign country. "*Morocco Bound*" *Syndicate, Ltd. v. Harris*, [1895] 1 Ch. 534.

(*y*) *In re Hawthorne* (1883), 23 Ch. D. 743. Conf. *White v. Hall* (1806), 12 Ves. 321.

profits of the mine which *A* claims by way of commission. The Court has no jurisdiction (*z*).

4. Action by *A & Co.*, a Portuguese company, against *X & Co.*, an English company, for trespass to *A & Co.*'s land in South Africa. The Court has no jurisdiction (*a*).

5. *A* files a bill for discovery to obtain inspection of documents in *X*'s possession in England in aid of proceedings about to be taken for recovery of land in India. The Court has no jurisdiction (*b*).

Exception (c).—Where the Court has jurisdiction to entertain an action against a person under either

(*z*) *Matthaei v. Galitzin* (1874), L. R. 18 Eq. 340.

"A foreigner resident abroad cannot bring another foreigner into this Court respecting property with which this Court has nothing to do. This Court is not to be made a vehicle for settling disputes arising between parties resident abroad." *Ibid.*, pp. 348, 349, per Malins, V.-C. *Seemle*, the real reason is the fact of the property being abroad. *A*, an alien, may certainly sue *X*, an alien, in England for breach of contract. Compare *Blake v. Blake* (1870), 18 W. R. 944; *Cookney v. Anderson* (1862), 31 Beav. 452. See, also, *Whitaker v. Forbes* (1875), 1 C. P. D. (C. A.) 51; *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509, 512. But contrast *Buenos Ayres Co. v. Northern Rail. Co.* (1877), 2 Q. B. D. 210.

(*a*) *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

(*b*) *Reiner v. Marquis of Salisbury* (1876), 2 Ch. D. 378.

"You cannot, in my opinion, maintain a suit in this country for the recovery of land in the colonies or a foreign country. If, then, this bill is for discovery in aid of a suit which cannot be maintained in this Court, that is, if the plaintiff does not show a title to sue, he shows no title to discovery." *Ibid.*, p. 385, judgment of Malins, V.-C. See also *Norton v. Florence Land, &c. Co.* (1877), 7 Ch. D. 332; *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681; *Re Holmes* (1861), 2 J. & H. 527.

(*c*) See, as to this anomalous exercise of jurisdiction, Westlake (5th ed.), pp. 230—234, ss. 172—174; Foote, chap. vi., pp. 178—187; and for its application to an administration action, see *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453.

"In cases of trusts, specific performance of contracts, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the *locus* the claim, of title set up by one party, whether a legal or an equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party; I do not think the Court ought to entertain jurisdiction to decide the matter" [in regard to land not in England]. *Deschamps v. Miller*, [1908] 1 Ch. 863, 864, judgment of Parker, J.

Rule 59(d), or under any of the Exceptions to Rule 60(e), the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England (foreign land), on the ground of either—

- (a) a contract between the parties to the action, or
 - (b) an equity between such parties (f)
- with reference to such immovable.

Comment.

The principle on which this exception, originally derived from the practice of the Court of Chancery, rests, is that though the Court has no jurisdiction to determine rights over foreign land, yet, where the Court has jurisdiction over a person *from his presence in England*, or now from the Court having jurisdiction to serve him with a writ or notice thereof though he is out of England (g), the Court has jurisdiction to, and will compel him to

(d) See p. 241, *post*.

(e) See p. 250, *post*.

(f) See *In re Smith, Lawrence v. Kitson*, [1916] 2 Ch. 206; 32 T. L. R. 546, where an order was made for the execution of a legal mortgage over land in Dominica by the legal personal representative of a person who had given an equitable mortgage, invalid by the local law, over the land. As to what may constitute an equity, compare illustrations, pp. 228—230, *post*; and contrast *Hicks v. Powell* (1869), L. R. 4 Ch. 741, and *Harrison v. Harrison* (1873), L. R. 8 Ch. 342. As to equitable interests in foreign land, and how far trusts can be engrafted on foreign land, see Lewin on Trusts (12th ed.), chap. iv., paras. 4—6, pp. 49—52.

(g) *Jenney v. Mackintosh* (1886), 33 Ch. D. 595; [1889] W. N. 94; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

"It is argued," says Byrne, J., in the last case, "that there is no precedent or authority for the exercise of the jurisdiction *in personam*, unless against persons actually within this country, and that to allow service of notice of writ upon a foreigner resident abroad, and then to act *in personam* against him, would in effect be to enlarge or extend the jurisdiction of the Court in a manner not authorized by principle or authority. . . .

"In the present case the service is authorized by the terms of the rule I have referred to [Ord. XI. r. 1 (g)], and I consider that to allow service in accordance with that rule is not to extend jurisdiction, but to enable the old jurisdiction to be exercised in a case where, at one time, it could not have been exercised by reason of defective rules of procedure." [1902] 2 Ch. 132, 142, 143. Compare *Bawtree v. Great North-West Central Railway* (1898), 14 T. L. R. 448, and see as to Ord. XI. r. 1 (g), Rule 60, Exception 8, p. 267, *post*.

The original jurisdiction of the Court of Chancery depended upon the defendant being in England, and thus within the jurisdiction of the Court in a way which enabled the Court to compel him to, *e.g.*, perform a contract with regard

dispose of, or otherwise deal with, his interest in foreign land so as to give effect to obligations which he has incurred with regard to the land. The obligations which the Court will thus enforce are not easily brought under any one definite head. Westlake describes them as obligations relating to immovables which arise from, or as from, a person's own contract or tort (*h*). Foote states that "the English Courts, acting *in personam* and not *in rem*, will make decrees, upon the ground of a contract or other equity subsisting between the parties, respecting property situated out of the jurisdiction" (*i*), *i.e.*, out of England.

This anomalous jurisdiction, it has been judicially laid down, "is grounded, like all other jurisdiction of the Court [of Chancery], not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the Court. If the Court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad;—if, for instance, as in *Penn v. Lord Baltimore* (*k*), it can decree the performance of an agreement touching the boundary of a province in North America, or, as in the case of *Toller v. Carteret* (*l*), can foreclose a mortgage in the Isle of Sark, . . . in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign Court" (*m*).

"The Courts of Equity in England are, and always have been, Courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always

to foreign land. As to the legitimacy of the extension of the Court's jurisdiction as regards foreign land to cases in which, under the present practice, the Court can serve a person with a writ though he is not in England, some doubt may be felt. See Foote (4th ed.), p. 182, note *u*. But the authority for such extension seems strong. The cases of its exercise arise mainly, if not entirely, under Ord. XI. r. 1 (*g*). (Rule 60, Exception 8.) They might (*semble*) arise in some other cases, *e.g.*, under Ord. XI. r. 1 (*c*). (Rule 60, Exception 3, p. 258, *post*.)

(*h*) See Westlake, s. 172. Compare *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 40, language of Selborne, C.

(*i*) See Foote (4th ed.), p. 179.

(*k*) (1750), 1 Ves. Sen. 444.

(*l*) (1705), 2 Vern. 494.

(*m*) *Lord Portarlington v. Soulby* (1834), 3 My. & K. 104, 108, judgment of Brougham, C.

"been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction" (n).

This indefinite jurisdiction is exceptional (o), and is (substantially) confined to cases in which there is either a contract between the parties, or something of the nature of a trust (p).

The Court, further, will not make a decree which runs contrary to the law of the country where the land affected is situate. "If, indeed, the law of the country where the land is situate should not permit, or not enable, the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment, the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities" (q).

Illustrations.

1. X, who is in England, has executed articles of agreement with A in England with reference to land in Canada. A brings an action against X for specific performance. The Court has jurisdiction (r).

(n) *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 40, per Selborne, C.

(o) See for example, *In re Hawthorne* (1883), 23 Ch. D. 743; *Matthæi v. Galitzin* (1874), L. R. 18 Eq. 340; *Norton v. Florence Land Co.* (1877), 7 Ch. D. 332.

(p) *Kildare v. Eustace* (1686), 1 Vern. 419; and see illustrations, *post*. "As to lands lying in a foreign country, the Court will enforce natural equities, and compel the specific performance of contracts, provided the parties be within the jurisdiction, and there be no insuperable obstacle to the execution of the decree." Lewin, *Law of Trusts* (12th ed.), p. 49. Contrast *Municipal Council of Sydney v. Bull*, [1909] 1 K. B. 7.

In certain cases jurisdiction may be exercised where movable and immovable property are involved in the same proceedings. *In re Clinton*, [1903] W. N. 20. Compare *Grey v. Manitoba, & Co. Company*, [1897] A. C. 254; *Hope v. Carnegie* (1866), L. R. 1 Ch. 320.

(q) *Ex parte Pollard* (1840), Mont. & Ch. 239, 250; 4 Deacon, 27; Westlake (5th ed.), s. 172. Conf. *In re Pearce's Settlement*, [1909] 1 Ch. 304. See also *British South Africa Co. v. De Beers Consolidated Mines*, [1910] 2 Ch. (O. A.) 502, 523, 524.

(r) See *Penn v. Baltimore* (1750), 1 Ves. Sen. 444; *Tulloch v. Hartley* (1841), 1 Y. & Coll. 114; *Black Point Syndicate v. Eastern Concessions, Ltd.* (1898), 79 L. T. 658.

2. *A* is the owner of an estate in St. Christopher, West Indies. *X*, a creditor of *A*'s, by unfair use of process in local Courts, causes *A*'s estate to be sold, and purchases it. *X* is in England. The Court has jurisdiction to decree reconveyance of estate (*s*).

3. A decree is made in the Court directing an inquiry to ascertain the amount of the mortgage debt due on lands in a West Indian Island in proceedings for redemption, all parties being in this country. The Court has jurisdiction to grant injunction restraining mortgagee of estate from proceeding on a bill of foreclosure in the colonial Court (*t*).

4. *A*, residing in England, brings an action against *X* and *Y*, also residing in England, to enforce a lien on land in Prussia. *Semble*, that, if *A* can show special circumstances arising out of the dealings between the parties, the Court may have jurisdiction to entertain the action (*u*).

5. *X* mortgages land in one of the colonies to *A*. *X* is in England. The Court has jurisdiction to make a foreclosure decree against *X* (*x*).

6. The Court has jurisdiction to take accounts between *A* and *X*, tenants of foreign land. *A* and *X* are in England (*y*).

7. *A* brings an action against *X*, who is in England, to be relieved of a charge on *A*'s land in Ireland, which charge has been obtained by fraud. *Semble*, the Court has jurisdiction (*z*).

8. *A* brings an action against *X*, *Y* and *Z* to enforce against real estate in Trinidad the trusts of a creditor's deed. *X*, *Y* and *Z* are the persons in whom the legal estate is outstanding. *X* and *Y* reside in England, and *Z* resides in Trinidad. The Court

(*s*) *Cranstown v. Johnston* (1796), 3 Ves. 170; (1800), 5 Ves. 277. See *Mercantile Investment, &c. Co. v. River Plate Co.*, [1892] 2 Ch. 303; *Cood v. Cood* (1863), 33 L. J. Ch. 273. But contrast *White v. Hall* (1806), 12 Ves. 321. See *Jackson v. Petrie* (1804), 10 Ves. 164.

(*t*) *Beckford v. Kemble* (1822), 1 S. & St. 7. See *Booth v. Leycester* (1837), 1 Keen, 579; *Bunbury v. Bunbury* (1839), 1 Beav. 318.

(*u*) *Norris v. Chambres* (1861), 3 De G. F. & J. 583; 30 L. J. Ch. 285. Conf. *Harrison v. Harrison* (1873), L. R. 8 Ch. 342; *Huntly v. Gaskell*, [1905] 2 Ch. (C. A.) 656, 665, per Vaughan Williams, L. J.

(*x*) *Paget v. Ede* (1874), L. R. 18 Eq. 118. Compare Westlake (5th ed.), s. 174. See *Beckford v. Kemble* (1822), 1 S. & St. 7.

(*y*) *Scott v. Nesbitt* (1808), 14 Ves. 438. Compare *Carteret v. Petty* (1676), 2 Swanst. 323 (n.), where the defendant was out of England.

(*z*) *Arglasse v. Muschamp* (1682), 1 Vern. 75. See *Kildare v. Eustace* (1686), 1 Vern. 419; *Angus v. Angus* (1737), West. 23; *Clark v. Ormonde* (1821), Jacob, 108. Conf. *Beckford v. Kemble* (1822), 1 S. & St. 7; *Bunbury v. Bunbury* (1839), 1 Beav. 318; *Tulloch v. Hartley* (1841), 1 Y. & Coll. 114; *Harrison v. Gurney* (1821), 2 Jac. & W. 563.

has jurisdiction to entertain the action against X and Y, and also against Z (a), i.e., he may be served with a writ in Trinidad (b).

9. A brings an action against X, who, though out of England, is domiciled or ordinarily resident in England, to be relieved of a charge on A's land in Ireland, which charge has been obtained by fraud. *Semble*, the Court has jurisdiction (c).

RULE 54 (d).—The Court has no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal or revenue (e) law of a foreign country.

Comment.

"The common law considers crimes as altogether local, and cognisable and punishable exclusively in the country where they are committed . . . The same doctrine has been frequently recognised in America. . . . Chief Justice Marshall, in delivering the opinion of the Supreme Court, said: 'The Courts of no country execute the penal laws of another'" (f).

"The rule that the Courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal

(a) *Jenney v. Mackintosh* (1886), 33 Ch. D. 595; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

(b) Under Ord. XI. r. 1 (g). See Exception 8 to Rule 60, p. 267, *post*.

(c) See *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *Bawtree v. Great North-West Central Railway* (1898), 14 T. L. R. 448; Ord. XI. r. 1 (c); and Exception 3 to Rule 60, p. 258, *post*.

(d) Story, ss. 620—622; Piggott (3rd ed.), p. 88; *Folliott v. Ogden* (1789), 1 H. Bl. 123; 2 R. R. 736; *Huntington v. Attrill*, [1893] A. C. 150; *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265; *Huntington v. Attrill* (1892), 146 U. S. 657; *Lynch v. Provisional Government of Paraguay* (1871), L. R. 2 P. & D. 268, 272; *Le Couturier v. Rey*, [1910] A. C. 262; *In re Fried Krupp Actiengesellschaft*, [1917] 2 Ch. 188; *Raulin v. Fischer*, [1911] 2 K. B. 93. Compare Intro., p. 37, *ante*, and Rule 136, p. 500, *post*.

(e) *Attorney-General for Canada v. Schulze* (1901), 9 Sc. L. T. 4; *Municipal Council of Sydney v. Bull*, [1909] 1 K. B. 7. Compare *Cotton v. R.*, [1914] A. C. 176, 195; *Indian & General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K. B. 539, 550; *Emperor of Austria v. Day* (1861), 3 De G. F. & J. 217, 241; *Spiller v. Turner*, [1897] 1 Ch. 911.

(f) See Story, ss. 620, 621, citing *The Antelope*, 10 Wheat. 66, 123. And compare *Folliott v. Ogden* (1789), 1 H. Bl. 123; 2 R. R. 736; *Ogden v. Folliott* (1790), 3 T. R. 726; *Rafael v. Verelst* (1775), 2 W. Bl. 983.

“laws, and to all judgments for such penalties. If this were not “so, all that would be necessary to give ubiquitous effect to a “penal law would be to put the claim for a penalty into the shape “of a judgment” (*g*).

Hence the High Court cannot entertain either an action for the recovery of a penalty due under the law of a foreign country, or an action on a foreign judgment for such penalty (*h*).

Question.—*What is a penal law?* The application of Rule 54 raises the difficult question, when is a law to be considered a penal law? or, what is really the same inquiry under another form, when is an action to be considered a penal action?

These inquiries are to be answered as follows: A “penal law” is strictly and properly a law which imposes punishment for an offence against the State; and a “penal action” is a proceeding for the recovery, in favour of the State, of a penalty due under a penal law (*i*). A law, on the other hand, is not a penal law merely because it imposes an extraordinary liability on a wrongdoer, in favour of the person wronged, which is not limited to the damages suffered by him; and an action for enforcing such liability, by the recovery of the penalty due to the person wronged, is not a penal action: the essential characteristic, in short, of a penal action is that it should be an action on behalf of the government or the community, and not an action for remedying a wrong done to an individual (*k*). A proceeding, then, in order to come within Rule 54, must be in the nature of a suit in favour of the State whose law has been infringed.

Illustrations.

1. X incurs a penalty of 100*l.* for the infringement of the law of a foreign country prohibiting the sale of spirits. The penalty is recoverable in the Courts of the foreign country in an action for debt brought by an official of the foreign government. X is in

(*g*) *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265, 290, *per curiam*. The passage is cited with approval not only by the Supreme Court in *Huntington v. Attrill* (1892), 146 U. S. 657, 671, but also by the Privy Council in *Huntington v. Attrill*, [1893] A. C. 150, 157.

(*h*) As to effect of foreign judgments, see chap. xvii., *post*, and especially Exception (p. 452) to Rule 114, *post*.

(*i*) *Huntington v. Attrill* (1892), 146 U. S. 657, 667, opinion of Supreme Court; *Huntington v. Attrill*, [1893] A. C. 150, 156, 157, judgment of Privy Council.

(*k*) *Ibid.*

England. The proper official brings an action in the High Court for the recovery of the 100*l*. The Court has no jurisdiction (*l*).

2. The circumstances are the same as in Illustration 1, except that the penalty is recoverable under the law of the foreign country by an informer, and *A*, the informer, brings an action for the recovery of the 100*l*. due from *X*. The Court has no jurisdiction (*m*).

3. Under the law of an American State, *X*, the treasurer of an insurance company in the State, incurs a penalty, amounting in English money to 100*l*., for not making certain returns in respect of the business of the company. The penalty is, under the law of the State, recoverable by a State official. Half the penalty, when recovered, is to be paid by him into the State treasury, and half is to be retained for himself. *A*, the State official, obtains judgment against *X* in the Court of the American State for the 100*l*. *X* is in England. *A* brings an action on the judgment against *X*. The Court has no jurisdiction (*n*).

4. Under the law of New York, the director of a trading corporation, who signs certain certificates with regard to the affairs of the corporation knowing such certificates to be false, becomes liable for the debts of the corporation. Under this law, *X*, a director of a New York company, becomes liable to *A*, a creditor for a debt due from the company. *X* is in England. *A* brings an action against *X* for the debt. *Semble*, the Court is not, under Rule 54, deprived of jurisdiction (*o*).

5. The circumstances are the same as in Illustration 4, except that *A* has recovered judgment in the Court of New York for the penalty, and brings an action against *X* in England on the judgment. *Semble*, the Court is not, under Rule 54, deprived of jurisdiction (*p*).

(*l*) Compare *Huntington v. Attrill*, [1893] A. C. 150.

(*m*) *Semble*, that this is so, even though the penalty goes wholly to the informer; for the object of the action is not to remedy a wrong done to the plaintiff, but to punish the defendant for violating the law of the foreign State. Compare *Robinson v. Currey* (1881), 7 Q. B. D. (C. A.) 465, and *Saunders v. Wiel*, [1892] 2 Q. B. (C. A.) 321. See *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265.

(*n*) See *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265.

(*o*) *Huntington v. Attrill*, [1893] A. C. 150. It is, of course, possible that the jurisdiction of the Court may be excluded under some other Rule in this Digest.

(*p*) *Huntington v. Attrill*, [1893] A. C. 150. This case throws light on the nature of a "penal law." See also *Raulin v. Fischer*, [1911] 2 K. B. 93.

6. Under an Act of the Parliament of New South Wales the Municipality of Sydney is authorized to carry out improvements in the city and to charge the cost to the owners of the property affected. X, an owner of property affected by the improvement scheme, is resident in England. The council of the municipality brings an action against X for the sum due from him under the New South Wales Act. The Court has no jurisdiction (*q*).

7. X, resident in England, owns property in Canada. A suit is brought against him there to recover taxes due to the Government in respect of his property, and judgment is given against him for the amount of the taxes due and costs. Execution is levied on the property, but the amount realized is insufficient to meet the amount of the judgment and costs. An action is brought against X in England to recover the amount of costs awarded by the Canadian judgment. The Court has no jurisdiction (*r*).

(B) WHERE JURISDICTION EXISTS.

(i) *In Respect of Persons.*

RULE 55 (*s*).—Subject to Rule 52, and to the exception hereinafter mentioned, no class of persons is, as such, excluded or exempt from the jurisdiction of the Court, *i.e.*, any person may be a party to an action or other legal proceeding in the Court.

Comment.

The High Court, subject to the very slight limitations referred to in our Rule, is open to persons of every description. No one is, on account of his mere position or status, precluded from being plaintiff in an action, or from taking legal proceedings in the Court. Nor, again, is any one, on account of his mere position or status, exempt from the liability to be made defendant in an action, or, speaking generally, to have legal proceedings taken

(*q*) *Municipal Council of Sydney v. Bull*, [1909] 1 K. B. 7.

(*r*) Compare *Attorney-General for Canada v. Schulze* (1901), 9 Sc. L. T. 4, Ct. of Sess., a case in which imported goods had been confiscated under the Customs Act.

(*s*) Compare Dicey, *Parties to an Action*, pp. 1—4; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28, judgment of Court delivered by Willes, J. Compare, especially, Illustrations to Rule 59, *post*.

against him in the High Court. In this matter, a British subject and an alien (*t*), a natural person and a corporation (*u*), an infant, a married woman, a peer, and (subject, of course, to the effect of Rule 52) a foreign sovereign (*x*), stand in exactly the same position. No foreigner is, as such, required even to give security for costs (*y*).

Exception.—The Court has no jurisdiction during the continuance of war to entertain an action brought by an alien enemy, unless he is living here under the license or protection of the Crown (*z*).

The term “alien enemy” includes any British subject or citizen of an allied or neutral State voluntarily residing during a war with Great Britain in a hostile country (*a*).

(*t*) *De la Vega v. Vianna* (1830), 1 B. & Ad. 284; *Melan v. Duke de Fitzjames* (1797), 1 B. & P. 138; *Worms v. De Valdor* (1880), 49 L. J. Ch. 261.

(*u*) *Magdalena Co. v. Martin* (1859), 2 E. & E. 94; *Carron Co. v. Maclaren* (1855), 5 H. L. C. 416; *Westman v. Aktiebolaget, &c.* (1876), 1 Ex. D. 237.

(*x*) *King of Spain v. Hullet* (1883), 1 Cl. & F. 333; *United States v. Wagner* (1867), L. R. 2 Ch. (C. A.) 582; *Republic of Liberia v. Imperial Bank* (1873), L. R. 16 Eq. 179; *Republic of Costa Rica v. Erlanger* (1876), 3 Ch. D. (C. A.) 62; *French Government v. Owners of S.S. Tsurushima Maru* (1921), 37 T. L. R. (C. A.) 961; *Emperor of Austria v. Day* (1861), 30 L. J. Ch. 690; 3 De G. F. & J. 217; *United States v. Prioleau* (1865), 2 H. & M. 559; *Republic of Peru v. Dreyfus* (1888), 38 Ch. D. 348. There is no rule that the monarch or other titular head of a foreign State is the only person who can sue here in respect of the public property or interest of that State; and *semble*, that an action on a contract made in a foreign country with a foreign government can be brought on behalf of that government by any person with whom the contract is made under the law of such foreign country. *Yzquierdo v. Clydebank Engineering, &c. Co.*, [1902] A. C. 524.

(*y*) The Court can, it is true, in its discretion compel a plaintiff (even a foreign sovereign: *Republic of Costa Rica v. Erlanger* (1876), 3 Ch. D. (C. A.) 62; *The Neubattle* (1885), 10 P. D. (C. A.) 33), who is permanently residing out of England, to give security for costs, but this can be done in the case of a British subject no less than in that of an alien. Compare *New Fenix Compagnie, &c. de Madrid v. General Accident, &c. Co.*, [1911] 2 K. B. (C. A.) 619.

(*z*) *Wells v. Williams* (1697), 1 Salk. 46; *Le Bret v. Papillon* (1804), 4 East, 502; 7 R. R. 618; *Alcinous v. Nigreu* (1854), 4 E. & B. 217; 24 L. J. Q. B. 19; *Antoine v. Morshead* (1815), 6 Taunt. 237; *Daubuz v. Morshead* (1815), 6 Taunt. 332. But the Court has jurisdiction after the restoration of peace to entertain an action by an alien who was an enemy during the war in respect of a contract made before the commencement of the war. *Janson v. Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484.

(*a*) See, as to disabilities of an alien enemy, Dicey, *Parties to an Action*, pp. 3, 4, and Note 9 in the Appendix.

RULE 56 (b).—The Court has jurisdiction in an action (c) over any person who has by his conduct precluded himself from objecting to the jurisdiction of the Court.

Comment.

A person who would not otherwise be subject to the jurisdiction of the Court may preclude himself by his own conduct from objecting to its jurisdiction, and thus give the Court an authority over him which, but for his submission, it would not possess (d).

This submission may take place in various ways. A defendant in an action, who appears even if merely to take objection to the jurisdiction of the Court, without defending his case upon the merits, submits to its authority. So, again, does a person who, though he would not be otherwise liable to the Court's jurisdiction, has made it part of a contract that questions arising under the contract shall be decided by the Court. A person, further, who comes before the Court as a plaintiff in general gives the Court jurisdiction to entertain a counter-claim, or, in other words, a cross-action, against him (e), but not an action on an independent ground (f). Whether a person has or has not submitted to

It may be suggested that to this exception should be added another, viz., that the Court has no jurisdiction to entertain an action brought by the Crown. But though the Crown cannot bring an action, the Crown can take proceedings in the High Court by information, &c., e.g., for recovery of debts; and with the technical rules as to practice, except in so far as they determine the jurisdiction of the Court, this Digest is not concerned.

(b) This Rule is manifestly a mere application of General Principle No. IV., p. 44, *ante*. See *Boyle v. Sacker* (1888), 39 Ch. D. (C. A.) 249; *Tharsis Sulphur Co. v. La Société des Métaux* (1889), 58 L. J. Q. B. 435 (action *in personam*). See further, p. 237, note (n), *post*; *Limerick Corporation v. Crompton*, [1910] 2 Ir. R. 416.

(c) The word "action" does not include a suit for divorce. See Rule 63, p. 291, *post*; and as to *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420; 31 L. J. P. & M. 37, see *Armitage v. Att.-Gen.*, [1906] P. 135, 140. Nor does it include bankruptcy proceedings, for the Court cannot adjudge a debtor bankrupt unless he falls within the terms of Rule 67 (2), p. 312, *post*.

(d) See Intro., General Principle No. IV., p. 44, *ante*; and compare, for an example of such submission, Exception 1 to Rule 52, p. 220, *ante*.

(e) See *Yorkshire Tannery v. Eglinton Co.* (1884), 54 L. J. Ch. 81, 83, judgment of Pearson, J.

(f) *Factories Insurance Co. v. Anglo-Scottish General Commercial Insurance Co., Ltd.* (1913), 29 T. L. R. 312, following *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. (C. A.) 487, 492.

the jurisdiction of the Court depends upon the circumstances of the case; but the Court, as regards its own jurisdiction, though not invariably (*g*) as regards the jurisdiction of foreign Courts, maintains the principle that submission gives jurisdiction.

In the application of this principle two things must be borne in mind.

The first is that the principle is applicable only to actions or to proceedings which are strictly of the nature of an action. The second is that submission can give the Court jurisdiction only to the extent of removing objections thereto which are purely personal to the party submitting, as, for example, the objection, in the case of a defendant, that he has not been duly served with a writ; submission cannot give the Court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the Court (*h*). Hence the principle does not apply to a suit for divorce (*i*).

Illustrations.

1. *A* brings an action against *X*, who has not been duly served with a writ. *X* takes no objection to the jurisdiction of the Court on account of want of due service, but defends himself on the merits of his case. The Court has jurisdiction to entertain an action against *X*.

2. *A* brings an action against *X*, who makes a counter-claim against *A* in respect of damages due from *A* to *X* for breach of a contract made between *A* and *X* in France, and to be performed wholly in France. *A* is a French subject domiciled in France and has never been in England. If *X* had brought an action against *A* for the breach of contract, *A* might have objected to the jurisdiction of the Court. *A*'s submission (*semble*) gives the Court jurisdiction to entertain the counter-claim (*k*).

3. *X* is a French company incorporated according to French law

(*g*) See, however, the recent decision, *Harris v. Taylor*, [1915] 2 K. B. (C. A.) 516, which widely extends the effect of submission to a foreign Court.

(*h*) Light is thrown, as to the limits within which consent or submission can give jurisdiction, by cases on prohibition, such as *Farquharson v. Morgan*, [1894] 1 Q. B. (C. A.) 552; *Mayor of London v. Cox* (1867), L. R. 2 H. L. 239; *Broad v. Perkins* (1888), 21 Q. B. D. (C. A.) 533; *Buggin v. Bennett* (1767), 4 Burr. 2035.

(*i*) Compare *Armitage v. Att.-Gen.*, [1906] P. 135, 140, judgment of Sir J. Gorell Barnes, which in effect, and rightly, it is submitted, overrules *Zycklinski v. Zycklinski* (1862), 2 Sw. & Tr. 420.

(*k*) See *Yorkshire Tannery v. Eglington Co.* (1884), 54 L. J. Ch. 81.

and carrying on business at Paris, where is the company's principal office. *X* has no place of business in the United Kingdom. *A* is a copper company with registered office at Glasgow, carrying on business at Newcastle-on-Tyne. There is a contract between *A* and *X* whereby *A* agrees to sell, and *X* agrees to purchase, copper. It is part of the contract that it should be construed according to English law, and that *N* of London should be agent of *X*, "on whom any writ or other legal process arising out of the "contract might be served." *X* refuses to accept copper, or to pay for the same. *A* brings an action for breach of contract. Writ served on *N*. The Court has jurisdiction (*l*).

4. *X* is a Russian subject, residing at Odessa, but carrying on business in London. An action is brought by *A* and *B*, a London firm, for the delivery of certain goods to *A* and *B* by *X*, and for an injunction to restrain *X* from dealing with goods. *X* is not in England. Leave is obtained *ex parte* for service of writ on *N*, *X*'s solicitor. *X* appears by counsel and files affidavits, and the case is argued on its merits; objection is then taken against the order allowing substituted service. The Court has jurisdiction (*m*).

5. Action by *A* and *B*, owners of British ship the *Kildona*, against the *Gemma*, a foreign ship, of which *X* and *Y* are owners, for damages caused by collision in the Thames between the *Gemma* and the *Kildona*. *X* and *Y* enter appearance, and the *Gemma* is released on bail. Judgment against *X* and *Y*. Having appeared, they are personally liable to pay the amount of judgment (*n*).

6. *W*, a wife, petitions for divorce from *H*, her husband. Neither *W* nor *H* is domiciled in England. *H* appears abso-

(*l*) *Tharsis Sulphur Co. v. La Société des Métaux* (1889), 58 L. J. Q. B. D. 435. Note that the jurisdiction arises from the contract, and is independent of the Rules of Court contained in Ord. XI. r. 1. Contrast *British Wagon Co. v. Gray*, [1896] 1 Q. B. (C. A.) 35, and see Ord. XI. r. 2a, Rule 60, p. 272, *post*.

(*m*) *Boyle v. Sacker* (1888), 39 Ch. D. (C. A.) 249. The ground of jurisdiction is that the defendant, having appeared and argued the case on the merits, cannot then take objection to the service.

On the rule laid down by the Court of Appeal in *Harris v. Taylor*, [1915] 2 K. B. (C. A.) 516, as applied to the jurisdiction of English Courts, it would seem that, even had the defendant merely appeared to contest the jurisdiction, the Court would, on deciding adversely to this claim, have had jurisdiction to decide the issue on its merits, and so it was held in *Wansborough Paper Co. v. Laughland*, [1920] W. N. 394.

(*n*) *The Gemma*, [1899] P. (C. A.) 285, followed in *The Dupleix*, [1912] P. 8. See also *The Broadmayne*, [1916] P. (C. A.) 64, 68, 69, per Swinfen Eady, L. J.; 74, per Pickford, L. J.; 76, 77, per Banks, L. J.

lutely and not under protest, and obtains further time to make an answer. The Court has no jurisdiction to grant a divorce (o).

(ii) *In Respect of Subject-Matter.*

RULE 57 (p).—The Court has jurisdiction to entertain proceedings for the determination of any right over, or in respect of,

(1) any immovable,

(2) any movable,

situate in England.

This Rule must be read subject to the Rules governing the jurisdiction of the Court in particular kinds of action or proceedings.

Comment.

This Rule is of the most general description. All that it asserts is the jurisdiction of the Court in respect of all property, whether immovable or movable, situate in England. How far, if at all, the exercise of this authority is restricted by the Rules governing the jurisdiction of the Court in any particular kind of action, *e.g.*, an action *in personam* or an action *in rem*, must be gathered from such Rules (q).

The jurisdiction of the Court as regards English immovables, *e.g.*, land or houses, is, as contrasted with the jurisdiction of any foreign (r) Court, exclusive (s). Our Rule applies (*inter alia*) to

(o) *Armitage v. Att.-Gen.*, [1906] P. 135; *Sinclair's Divorce Bill*, [1897] A. C. 469.

(p) Territorial jurisdiction "exists always as to land within the territory, "and it may be exercised over movables within the territory." *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 683, *per curiam*.

(q) See chaps. v. to ix., Rules 59—78, *post*. Jurisdiction to expunge a trade mark from the register may be executed though the registered owner is not within the jurisdiction and cannot be served abroad with notice of motion, though informal notice should be given him. *In re King & Co.'s Trade Mark*, [1892] 2 Ch. (C. A.) 462. (Under Ord. XI. r. 8a, notice of motion in such cases can now be served abroad, but the jurisdiction does not depend on service, but on the situation of the movable.)

(r) The Rules in this Digest have, it must constantly be borne in mind, nothing to do with the relative jurisdiction of the High Court and other English Courts.

(s) See, as to Principle of Effectiveness, Intro., General Principle No. III., p. 40, *ante*. How far jurisdiction as to land is subject to the restrictions in

any question as to the title to English land, whether it be freehold or leasehold (and therefore personal property (*t*)), under a will or under an intestacy: such a question must be determinable by the High Court, and cannot be determined by any foreign Court.

The jurisdiction of the Court as regards movables, *i.e.*, goods or choses in action, in England, is, as compared with the jurisdiction of foreign Courts, not necessarily exclusive. There are many cases in which the title to movables, even when situate in England, may be decided either by the High Court or by a foreign Court; thus the right to succeed to the movables in England of a person who has died domiciled in France may be decided either by the High Court or by the French Courts. The decision, indeed, belongs preferably to the French Courts, and when given by a French Court will in general be held conclusive by our Courts (*u*). On the other hand, the English Court alone can deal with such property as a registered trade mark, or copyright, or trade name (*x*).

Illustrations.

1. *T*, a Frenchman domiciled in France, dies intestate leaving leasehold property in England. The Court has exclusive jurisdiction to determine whether *A*, *T*'s heir under the law of France, is or is not entitled to succeed to the leaseholds (*y*).

2. *T*, an Englishman domiciled in France, dies intestate leaving money and stock-in-trade in England. The Court has jurisdiction to determine whether *A*, *T*'s son, is or is not entitled to succeed to money and stock-in-trade (*z*). But the French Courts have also jurisdiction to decide the matter (*a*).

Rule 52, p. 215, *ante*, is not clear. Compare Westlake, s. 191. As to jurisdiction in regard to trust-funds in which foreign governments are interested, compare *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 39, per Lord Langdale; *Strousberg v. Republic of Costa Rica* (1880), 29 W. R. 125; *Gladstone v. Musurus Bey* (1862), 1 H. & M. 495, with *Smith v. Weguelin* (1869), L. R. 8 Eq. 198; *Larivière v. Morgan* (1875), L. R. 7 H. L. 423; *Twycross v. Dreyfus* (1877), 5 Ch. D. (C. A.) 605, in all of which cases no trust was proved.

(*t*) As to real property and personal property, see pp. 75—77, *ante*.

(*u*) See Rules 78 and 102, *post*, and *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 502, 503, language of Lord Selborne; *Doglioni v. Crispin* (1866), L. R. 1 H. L. 301.

(*x*) *Lecouturier v. Rey*, [1910] A. C. 262.

(*y*) See Rule 150, *post*, as to the question being determinable by the *lex situs*.

(*z*) *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402.

(*a*) See Rules 102, 121, and 192, *post*, as to the decision being governed by the *lex domicilii* of *T*, *i.e.*, by the law of France.

RULE 58.—Subject to Rules 52 to 54, the Court exercises—

- (1) Jurisdiction in actions *in personam* (*b*);
- (2) Admiralty jurisdiction *in rem* (*c*);
- (3) Divorce jurisdiction, and jurisdiction in relation to validity of marriage and to legitimacy (*d*);
- (4) Jurisdiction in bankruptcy (*e*);
- (5) Jurisdiction in matters of administration and succession (*f*);

to the extent, and subject to the limitations, hereinafter stated in the Rules (*g*) having reference to each kind of jurisdiction.

(*b*) See chap. v., Rules 59, 60, pp. 241, 250, *post*.

(*c*) See chap. vi., Rule 61, p. 280, *post*.

(*d*) See chap. vii., Rules 62 to 66, pp. 285—305, *post*.

(*e*) See chap. viii., Rules 67 to 74, pp. 312—331, *post*.

(*f*) See chap. ix., Rules 75 to 78, pp. 335—351, *post*.

(*g*) Including, of course, the Exceptions thereto.

CHAPTER V.

JURISDICTION IN ACTIONS *IN PERSONAM*.

RULE 59 (*a*).—When the defendant in an action *in personam* is, at the time for the service of the writ, in England (*b*), the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises.

Comment.

That this Rule may apply, two conditions must be fulfilled.

First. The action must be an action in personam.

An action *in personam* may be defined positively, though perhaps for the purpose of this Digest a little too narrowly, as an action against a person with a view to enforce the doing by him of some particular thing, *e.g.*, the payment of damages for a breach of contract or for a tort; under this head come *inter alia* every common-law action, whether on contract or for tort, and also every equitable proceeding, the object of which is to compel the doing or the not doing of a particular thing, as, *e.g.*, the specific performance of a contract. An action *in personam* may be negatively, and, for the purpose of this Digest, somewhat more extensively described as any action which is not an admiralty action *in rem*, a probate action, or an administration action (*c*).

It may be well, though hardly necessary, to add that an action

(*a*) Westlake (5th ed.), ss. 180—189; Story, chap. xiv.; Foote, pp. 322—337, 448—452; *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509, 510; *Jackson v. Spittall* (1870), L. R. 5 O. P. 542, 549; and American cases, *Peabody v. Hamilton*, 106 Mass. 217; *Roberts v. Knights*, 7 Allen (Mass.), 449. Compare *Fry v. Moore* (1889), 23 Q. B. D. (C. A.) 395. As to power of Court to stay an action, see *Logan v. Bank of Scotland*, [1906] 1 K. B. (C. A.) 141. Common law Courts had originally no jurisdiction over contracts made or torts committed abroad. See Holdsworth, Hist. 1, 307.

(*b*) See as to meaning of "England," p. 72, *ante*.

(*c*) Compare Rule 78, and comment thereon, p. 351, *post*.

in personam does not include any proceeding which is not in strictness an "action" at all, such as a proceeding for divorce, or for a declaration of nullity of marriage or of legitimacy, or a proceeding in bankruptcy or lunacy or regarding the custody of infants, or motions to set aside arbitral awards.

Secondly. At the time for the service of the writ, the defendant must be in England.

Every action in the High Court now commences with the issue of a writ of summons (*d*), which is in effect a written command from the Crown to the defendant to enter an appearance in the action; and the service of the writ, or something equivalent thereto (*e*), is absolutely essential as the foundation of the Court's jurisdiction. Where a writ cannot legally be served upon a defendant, the Court can exercise no jurisdiction over him. In an action *in personam* the converse of this statement holds good, and wherever a defendant can be legally served with a writ, there the Court, on service being effected, has jurisdiction to entertain an action against him. Hence, in an action *in personam*, the rules as to the legal service of a writ define the limits of the Court's jurisdiction (*f*). Now, a defendant who is in England can always, on the plaintiff's taking proper steps, be legally served with a writ. The service should be personal, but if personal service cannot be effected, the Court may allow substituted or other service (*g*). In other words, the Court has jurisdiction to entertain an action *in personam* against any defendant who is in England at the time for the service of the writ.

This principle applies to any defendant who is in England at the time for the service of the writ, but the application differs according as the defendant be, as he usually is, a natural person, or a corporation, *i.e.*, a person created by law.

(*d*) See Ord. I. r. 1, and 3 Steph. Comm., chap. xiv. (14th ed.), p. 560.

(*e*) *E.g.*, an undertaking in writing to accept service, and the entering of an appearance under Ord. IX. r. 1, which is itself a mere illustration of Rule 56, p. 235, *ante*, as to the effect of submission. See further, as to service of writ, Ords. IX., X., and XI.

(*f*) See *Heinemann v. Hale*, [1891] 2 Q. B. 83, 86, 87, judgment of Cave, J. This is not so in all actions. In a probate action, for example, it is always possible, with the leave of the Court, to effect service on a defendant (Ord. XI. r. 3), but the Court may nevertheless not have jurisdiction. So in a proceeding for divorce, which, though not an action, partakes in some respects of the nature of an action, service of a petition or citation is not decisive of the Court's jurisdiction, which depends at bottom on the domicile of the parties. See Rules 62, 63, pp. 285—291, *post*.

(*g*) See Ord. IX. r. 2.

Where the defendant is a natural person.—Every such person is liable when in England to be served with a writ by a plaintiff *in personam*, and this is so however short may be the period for which he is present in England, whether his presence there is voluntary or involuntary (*e.g.*, as a prisoner of war), and whatever his nationality (*e.g.*, even if he is an alien enemy interned as a precautionary measure).

Thus a person who has crossed from Boulogne to Dover and intends to return next day, or even on the evening of the same day, is liable to be served with a writ by a plaintiff in an action brought to recover a debt due to the plaintiff incurred by the Frenchman and payable in Paris. Doubt has been cast on the doctrine (*h*), and it has been contended that a writ cannot rightly be served on a foreigner who is not strictly speaking resident in England. There is, however, no decided case which determines what is the sort of residence required to render a foreigner, present in England for however short a period, liable to an action for a debt incurred by him either in England or elsewhere, and the view expressed above has the support of weighty dicta by Lord Russell of Killowen (*i*). The history of English procedure bears out this view; the right of an English Court to entertain an action depended originally upon a defendant being served in England with the King's writ, and this again was only part of the general doctrine that any person whilst in England owed at least temporary allegiance to the King.

Where the defendant is a corporation.—In this case also presence in England at the time of service of the writ is essential. This principle applies easily enough where the defendant is a natural person, since the fact whether a man is at a given moment in England presents no special difficulty in its ascertainment, but when the defendant is a corporate body, some difficulty may arise in determining whether the corporation can be treated as residing or being present in England.

(*h*) See Foote (4th ed.), pp. 334—337.

(*i*) See *Carriok v. Hancock* (1895), 12 T. L. R. 59, especially the passage cited p. 400, *post*. The case refers to the service of a writ or regular notice of action upon a British subject present in Sweden. But this circumstance increases the authority of the language used by Lord Russell. No judge of any country willingly concedes to the Courts of a foreign country a wider jurisdiction than is claimed by the Courts of his own country. The decision is referred to with approval in *Harris v. Taylor*, [1915] 2 K. B. (C. A.) 580, 592, per Bankes, L. J.

In the case of an English company registered under the Companies (Consolidation) Act, 1908, or any other Act, no difficulty arises. Even if the company is formed to carry on business abroad, and its business is so exclusively conducted there that it is not liable to the British Income Tax Acts, nevertheless the company by virtue of its incorporation is present in England, and service of a writ can always be effected by leaving it at, or sending it by post to, the registered office of the company in England (*k*).

In the case of foreign corporations more difficulty may arise. The simplest case is that of a company incorporated outside the United Kingdom, which establishes a place of business in England, and as required by the Companies (Consolidation) Act, 1908, s. 274, files with the Registrar of Companies the name of a person authorized to accept service of process on behalf of the company; in that case service can be effected as in the case of an English company. Apart, however, from cases such as this, a corporation can be treated as being present in England for the purpose of serving a writ upon it when the company carries on business in England. The question whether a corporation is carrying on business here is one of fact not always easy to determine. A foreign railway company, for example, may perform part of its business, say the selling of tickets in London, without necessarily carrying on business there. The answer to the question whether it does or does not carry on business in England depends upon whether or not the agent who sells the tickets makes a contract for the foreign company, or merely sells the tickets as part of his own business (*l*). This is substantially a question as to the relation of the agent towards the foreign company. In order, further, that a foreign corporation may be treated as being in England, the requirements of Order IX. r. 8, as to the service of a writ in England on a corporate body, must be complied with. Thus the agent on whom the service is made must have some fixed office in England where he acts on behalf of the corporation (*m*).

(*k*) See Ord. IX. r. 8; Companies (Consolidation) Act, 1908, ss. 62, 116.

(*l*) *Thames & Mersey Marine Insurance Co. v. Societa di Navigazione* (1914), 114 L. T. (C. A.) 97, judgment of Buckley, L. J., pp. 98, 99. Compare *Saccharin Corporation, Ltd. v. Chemische Fabrik von Heyden*, [1911] 2 K. B. (C. A.) 516; *Okura & Co., Ltd. v. Forsbacka Jernverks Actiebolag*, [1914] 1 K. B. (C. A.) 715.

(*m*) *Carron Co. v. Maclaren* (1855), 5 H. L. 416, and *Mackereth v. Glasgow and South Western Railway Co.* (1873), L. R. 8 Ex. 149, are cases in which service was held to be bad on the ground that the extent of the business in England and the status of the officer served were insufficient to bring the cases

If the conditions laid down in Rule 59 are fulfilled, the Court has the most extensive jurisdiction in respect of causes of action of every kind. Hence our tribunals have been said "to be more open to admit actions founded upon foreign transactions than those of any other European country" (*n*). They in general exercise, as already pointed out, no jurisdiction with respect to matters relating to foreign land (*o*). But, "so far as relates to the question of jurisdiction, we apprehend," it has been laid down, "that the superior Courts of England did not decline *jurisdiction* in the case of *any transitory cause of action*, whether between British subjects or foreigners, resident at home or abroad, or whether any or every fact necessary to be proved, in order to establish either the plaintiff's or the defendant's case, arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the Courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory, and if the process of the Court had been brought to bear against the defendant by service of a writ on him where present in England" (*p*); and what was true of the Superior Courts in 1870 holds good now of the High Court.

It will be observed (*q*) that, speaking generally, though the principle is subject to several exceptions, the High Court has no jurisdiction to serve a writ, or the equivalent to a writ, in an action *in personam* on any defendant who is not in England, and hence, as expressed in this Digest, has no jurisdiction over such defendant. But under, at any rate, one Rule of Court a defendant who is not in England can, indirectly and through an agent who is in England, be served with a writ there, and thus come within the

within the terms of the order. See also *The Princess Clementine*, [1897] P. 18; *Allison v. Independent Press Cable Association of Australasia* (1911), 28 T. L. R. (C. A.) 128.

As Ord. IX. r. 8 applies only in the absence of any statutory provision regulating service of process, service cannot be effected under it on a Scottish or Irish company registered under the Companies (Consolidation) Act, 1908, or any Act making such provision. Compare *Palmer v. Caledonian Railway Co.*, [1892] 1 Q. B. (C. A.) 823, with *Logan v. Bank of Scotland*, [1904] 2 K. B. 495.

(*n*) *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28, *per curiam*. Compare *Western Bank v. Perez*, [1891] 1 Q. B. (C. A.) 304, 309, 311, judgment of Esher, M. R.; pp. 316, 317, judgment of Bowen, L. J.

(*o*) See Rule 53, p. 223, *ante*.

(*p*) *Jackson v. Spittall* (1870), L. R. 5 C. P. 542, 549.

(*q*) See Rule 60, p. 250, *post*.

jurisdiction of the High Court. The rule referred to is Order IX. r. 8a, and for the present purpose may be stated as follows:—

“The Court has jurisdiction where a contract has been entered “into [in England (*r*)] by or through an agent residing or carrying on business in England on behalf of a principal residing or “carrying on business out of England relating to or arising out “of such contract” (*s*).

This result is obtained by the provision that in such an action a writ of summons may by leave of the Court or a judge given before the determination of such agent’s authority, or of his business relation to the principal, be served on such agent. Note that (i) the principal is in this case through the presence of his agent in England treated as though the principal were himself in England, though he may in fact be resident, *e.g.*, in Germany; (ii) the writ cannot be served without the permission of the Court, or a judge thereof, whereas a writ served upon a defendant actually in England is served as of right without any permission of the Court; (iii) leave to serve a writ can be obtained only whilst the agent’s authority, or his business relations with his principal, continue in existence. When leave to serve a writ has been obtained, a notice of the order giving leave and a copy thereof and of the writ of summons, must forthwith be sent by prepaid registered post letter to the defendant at his address out of England. These provisions, by which a defendant is treated as though he were in England because he is carrying on business there through an agent, are probably suggested by the principles as to the cases in which a foreign corporation may be treated as being resident in England because it carries on business there (*t*). They will obviate cases in which, under the rules as to service on corporations, service is sometimes impossible through technical difficulties (*u*), and also cases where it has proved impossible to serve a writ on a person residing out of England but trading in England in a firm name (*x*).

(*r*) “Within the jurisdiction.”

(*s*) See Ord. IX. r. 8a (July 14, 1920).

(*t*) See pp. 243, 244, *ante*. In *Montgomery, Jones & Co. v. Liebenthal & Co.*, [1898] 1 Q. B. 487, it was decided that in a case where service out of the jurisdiction could not be ordered, owing to the defendant being domiciled or ordinarily resident in Scotland, an agreement for service on an agent in England was none the less valid.

(*u*) Compare *Clokey v. London & North Western Railway Co.*, [1905] 2 Ir. R. 251.

(*x*) Compare Rule 60, Exception 11, p. 275, *post*.

Illustrations.

1. *X* incurs a debt to *A* in France. *A* brings an action against *X* (*y*) for the debt. The Court has jurisdiction to entertain the action (*z*).

2. *X* executes at Calcutta a bond in favour of *A*. *A* brings an action against *X* on the bond. The Court has jurisdiction (*a*).

3. *X*, a Frenchman, makes a contract in France with *A* for the delivery of goods by *X* to *A* in Paris. *A* brings an action against *X* for not delivering the goods. The Court has jurisdiction (*b*).

4. *A* has brought an action in France against *X*, a French citizen residing in France, for a debt incurred there by *X* to *A*, and has obtained a judgment against *X*. *A* brings an action against *X* on the judgment. The Court has jurisdiction (*c*).

5. *X* assaults *A* in France. *A* brings an action against *X* for the assault. The Court has jurisdiction (*d*).

6. *X* in Jamaica wrongfully imprisons *A*. *A* brings an action for false imprisonment against *X*. The Court has jurisdiction (*e*).

7. *A* & *B* are an English company owning a submarine telegraph between England and France. *X* is a Swedish subject, the owner of a Swedish ship. *X*'s ship, through the negligence of the captain and sailors, strikes against and injures the telegraphic cable. The damage is done on the high seas, more than three miles from land. *A* brings an action against *X* to obtain compensation for the damage. The Court has jurisdiction (*f*).

8. *X* & *Y* are Spanish subjects, the owners of a Spanish ship, which on the high seas comes into collision with a British ship belonging to *A*, a British subject. *A* brings an action against *X* & *Y* for damage caused to the ship. The Court has jurisdiction (*g*).

(*y*) In all these illustrations to Rule 59, it is of course assumed that *X* is in England at the time for the service of the writ.

(*z*) *De la Vega v. Vianna* (1830), 1 B. & Ad. 284.

(*a*) *Alliance Bank of Simla v. Carey* (1880), 5 C. P. D. 429.

(*b*) Compare *Roberts v. Knights*, 7 Allen, 449 (Am.).

(*c*) Compare *Godard v. Gray* (1870), L. R. 6 Q. B. 139, and *Schibbsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

(*d*) *Scott v. Seymour* (1862), 1 H. & C. 219; 31 L. J. Ex. 457; 32 L. J. Ex. 61.

(*e*) *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870) L. R. 6 Q. B. 1.

(*f*) *Submarine Telegraph Co. v. Dickson* (1864), 15 C. B. N. S. 759; 33 L. J. C. P. 139.

(*g*) Compare *The Chartered Bank of India v. Netherlands Navigation Co.* (1883), 10 Q. B. D. (C. A.) 521; *The Leon* (1881), 6 P. D. 148; *Re Smith*

9. *X*, an Italian subject carrying on business in England, is owner of an Italian ship. *X*'s ship comes on the high seas into collision with a British ship, and causes the death of *M*, one of the crew of such ship. *A*, the representative of *M*, brings an action against *X* to recover damages for the death of *M*. The Court has jurisdiction (*h*).

10. *X & Y* are British subjects, and the owners of a British ship. The ship, when on the high seas, comes into collision, through the negligence of her crew, with a Norwegian ship, and thereby causes the death of *M*, a Norwegian seaman, on board the Norwegian ship. *A*, the representative of *M*, brings an action, under the Fatal Accidents Acts, 1846 and 1864, against *X & Y* for damages. The Court has jurisdiction (*i*).

11. The *Atjeh*, a Dutch ship, comes into collision on the high seas with the *Kroon-Prins*, another Dutch ship, through the negligence of the crew of the *Atjeh*. The owner of the *Atjeh*, *X*, is in England. *A*, the owner of the *Kroon-Prins*, brings an action against *X* for the damage done by the *Atjeh* to the *Kroon-Prins*. The Court has jurisdiction (*k*).

12. A steamer belonging to *A* renders salvage services to a ship on the high seas belonging to *X* and *Y*. *A* brings an action *in*

(1876), 1 P. D. 300. In the last case the action, it is true, could not be maintained, but this was owing to the impossibility of effecting service on the defendants in England.

(*h*) See *The Guldfaxe* (1868), L. R. 2 A. & E. 325; *The Beta* (1869), L. R. 2 P. C. 447; *The Explorer* (1870), L. R. 3 A. & E. 289. Compare, however, *The Franconia* (1877), 2 P. D. (C. A.) 163, with *Harris v. Owners of Franconia* (1877), 2 C. P. D. 173, and *Seward v. Vera Cruz* (1884), 10 App. Cas. 59.

"It is not necessary to decide whether—assuming, of course, that no technical difficulty arises as to the service of proceedings—the action could be maintained in the English Courts, the death occurring through negligence in a collision upon the high seas, where both parties were foreigners, or where the wrongdoers were foreigners and the sufferers English. My present opinion is that an action could be maintained, but I desire to be understood as not expressing, as it is not necessary to express, a decided opinion upon this point. Here the plaintiff seeks to enforce her claim against an English subject, and I cannot see why she should not do so." *Davidsson v. Hill*, [1901] 2 K. B. 606, 614, 615, judgment of Kennedy, J. All doubt is removed by the Maritime Conventions Act, 1911, s. 5.

(*i*) *Davidsson v. Hill*, [1901] 2 K. B. 606; *The Explorer* (1870), L. R. 3 A. & E. 289; *Adam v. British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, not followed.

(*k*) See *The Chartered Bank of India v. Netherlands Navigation Co.* (1883), 10 Q. B. D. (C. A.) 521, especially judgment of Brett, L. J., 536, 537; *The Leon* (1881), 6 P. D. 148.

personam against X and Y for the services rendered. The Court has jurisdiction (*l*).

13. A, an American citizen, brings an action against X, an American citizen, for a libel published by X of A in New York. The Court has jurisdiction (*m*).

14. X & Co. are a French corporation residing in Paris where their business is carried on. They occupy for a little more than a week a stand at the Crystal Palace in London, where N, their agent, explains the working of the articles there offered for sale, recommends the purchase of the said articles, and takes orders for the purchase of the same, whereby he binds X & Co. X & Co. carry on business in England. They are, therefore, present in England, and the Court has jurisdiction to entertain an action by A against X & Co. for delivery of goods (*n*).

15. X & Co., a French corporation formed under French law, have a head office at Paris and own steamers trading between French and English ports. X & Co. pay rent of office in London, where their name is printed up. N acts for X & Co. and for other companies as agent, and also does business on his own account. N secures freight and passage engagements for X & Co. N collects payments for freights and transmits them to X & Co. and forwards and delivers goods carried by X & Co. A collision takes place between *La Bourgogne*, a ship belonging to X & Co. and a ship of A. A brings an action in the Admiralty Division against X & Co. and serves a writ on A under Order IX. r. 8, on N as agent of X & Co. The Court has jurisdiction (*o*).

16. X & Co. are an American corporation created under the law of New York for carrying on the business of an hotel there. The offices of X & Co. are in New York, and the business is managed by a Board of Directors resident there. The greater part of the capital is held by English shareholders. There is an agent of the company, N, in England, who performs some duties for the company in England. A brings an action to restrain X & Co. from carrying out certain resolutions for the reconstruc-

(*l*) *The Elton*, [1891] P. 265.

(*m*) See *Field v. Bennett* (1886), 56 L. J. Q. B. D. 89. In this case the defendant, Bennett, was not in England. If he had been, there would have been no difficulty in maintaining an action against him for a libel, whether published in England or the United States. See Rules 187—189, pp. 694—696, *post*.

(*n*) See *Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft, &c.*, [1902] 1 K. B. (C. A.) 342, and compare *La Bourgogne*, [1899] A. C. 431.

(*o*) *La Bourgogne*, [1899] A. C. 431.

tion of the company. A writ is served on *N*, the agent, in England. The Court has no jurisdiction (*p*).

17. *X & Co.* are a company formed under an English Act of Parliament for carrying on business at Calcutta. The whole business is there carried on by four of the directors of the company living in Calcutta, and the whole profits of the company are made there. A creditor of the company serves a writ on the company at its registered office in London. The Court has jurisdiction.

18. *A*, residing in England, through *N*, *X*'s agent carrying on business on behalf of *X* in London, supplies goods to *X*, who resides in Jersey. *X* is indebted to *A* for the price of the goods supplied. *A*, whilst *N* is still *X*'s agent, obtains from the Court leave to serve a writ in an action against *X* on *N*, *X*'s agent. The Court has jurisdiction.

19. The circumstances are the same as in the last illustration, except that before *A* applies for leave to serve a writ on *N*, *N* has ceased to be *X*'s agent, and to have any business relations with *X*. The Court has no jurisdiction (*q*).

20. The case is the same as illustration 19, except that *X*, *N*'s principal, resides and carries on business in Scotland. The Court has jurisdiction.

RULE 60 (*r*).—When the defendant in an action *in personam* is, at the time for the service (*s*) of the writ, not

(*p*) *Semble*, *N* has no general authority to represent *X & Co.* See *Badcock v. Cumberland Gap Co.*, [1893] 1 Ch. 362. Contrast *Haggin v. Comptoir d'Escompte de Paris* (1889), 23 Q. B. D. (C. A.) 519, where the agent in London of a French company had a general authority to represent the company.

(*q*) Jurisdiction may, however, be exercised under Exception 5 to Rule 60, *i.e.*, under Ord. XI. r. 1 (e) (ii).

(*r*) See, *e.g.*, *In re Busfield* (1886), 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.; *Jackson v. Spittall* (1870), L. R. 5 O. P. 542; Ord. XI. r. 1; *In re Eager* (1882), 22 Ch. D. (O. A.) 86.

(*s*) When a writ for service in England has been issued against a defendant, who (being a British subject) is, at the time of the *issue*, in England, and the defendant after the writ has come to his knowledge has, before due service of the writ, left England, though not, it may be, for the purpose of avoiding service, the Court may (*semble*) make an order for substituted service of the writ under Ord. IX. r. 2, provided that the circumstances of the case show that it would be just to make such an order. *Jay v. Budd*, [1898] 1 Q. B. (C. A.) 12, 15, 18; and compare *Western Suburban & Notting Hill Building Society v. Rucklidge*, [1905] 2 Ch. 472. If this be so, the Court may, under the conditions mentioned, in effect exercise jurisdiction over a defendant who is in England at the time of the issue of the writ, as though he were in England at the time of the service of the writ. But the circumstances of *Jay v. Budd* are very

in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action.

Comment.

When it is not legally allowable to serve a defendant with a writ, the Court (as already pointed out) (*t*) has no jurisdiction to entertain an action against him; every restriction, therefore, on the legal possibility of serving a defendant with a writ, is in substance a restriction on the Court's jurisdiction, and is treated as such in this work.

But at common law (*u*) a writ could never be served on a defendant when out of England (*v*), and in an action *in personam* this common-law doctrine is still (subject to definite though very wide exceptions) maintained; or, in other words, the Court has, as a rule, no jurisdiction to entertain an action *in personam* against a defendant who, at the time for service of the writ, is in a foreign country.

This common-law principle has been modified by Rules of Court (*x*) made under statutory authority by the judges, and in very many actions service (*y*) can be effected on, *i.e.*, the Court exerts

peculiar, and the power to allow service on a defendant out of England otherwise than under Ord. XI. rr. 1, 2a, or Ord. XLVIII. r. 1, *i.e.*, under the Exceptions to Rule 60, is otherwise strictly limited to the cases in which a defendant is keeping out of the jurisdiction to evade service. *In re Urguhart* (1890), 24 Q. B. D. 723; *Wüding v. Bean*, [1891] 1 Q. B. (C. A.) 100, 102; *Trent Cycle Co. v. Beattie* (1899), 15 T. L. R. 176. See also *Fry v. Moore* (1889), 23 Q. B. D. (C. A.) 395, 397, 399, judgments of Lindley and Lopes, L. JJ.; *Field v. Bennett* (1886), 56 L. J. Q. B. 89; *Hillyard v. Smith* (1887), 36 W. R. 7.

(*t*) See p. 242, *ante*.

(*u*) See as to proceedings by means of outlawry and distringas, *Jackson v. Spittall* (1870), L. R. 5 C. P. 542; 3 Blackstone, pp. 280 and xvii.; First Report of Commissioners for Inquiring into the Process, &c. of the Superior Courts of Common Law (1851), pp. 4—7; and compare 2 Spence, Jurisdiction of the Courts of Chancery, p. 7, note (*a*), for service of writs of subpoena in suits instituted here on parties living out of England, and General Orders of 8th May, 1845, Order 32.

(*v*) See *In re Busfield* (1886), 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.

(*x*) See especially, Ord. XI. rr. 1, 2a.

(*y*) The service may be service of the notice of a writ. "When the defendant "is neither a British subject nor in British dominions, notice of the writ, and "not the writ itself, is to be served upon him." Ord. XI. r. 6. But for our present purpose service of notice is equivalent to service of a writ. Substituted service may be allowed at the discretion of the Court either without or within England. *Ford v. Shephard* (1885), 34 W. R. 63; *Western, &c. Building Society v. Rucklidge*, [1905] 2 Ch. 472.

jurisdiction over, a defendant irrespective of nationality, who is out of England. These cases form the eleven Exceptions to our Rule, and very greatly restrict its sphere of operation by enabling the Court to exercise jurisdiction in all the more important classes of actions *in personam* over defendants out of England. The Rule and the Exceptions, taken together, constitute, what has hitherto hardly existed, a body of principles defining, in actions *in personam*, the extra-territorial jurisdiction of the Court.

As to the general character of these Exceptions, the following points should be noted.

First. They all arise under Rules of Court, and all but Exception 11 (z) arise under Rules of Court, 1883, Ord. XI. r. 1, as amended last by R. S. C. (No. 3), 1920, and R. S. C., June 23, 1921, and r. 2a.

Secondly. The Exceptions are exhaustive; they are intended to embody the effect on the jurisdiction of the Court of all the Rules of Court having reference to service in an action *in personam* on a defendant who is out of England (a); and such Rules of Court are themselves exhaustive, the practice of the Courts, the jurisdiction whereof is transferred to the High Court, being, except where it is expressly kept alive (b), obsolete (c).

Thirdly. There is an essential difference between the jurisdiction exercised by the Court when the defendant in an action is in England and the jurisdiction exercised by the Court when the defendant is not in England, *i.e.*, when an action comes within the Exceptions to Rule 60. When the defendant is in England, the jurisdiction of the Court is not discretionary; the plaintiff has a right to demand (d) that if it exist it shall be exercised. When

(z) This Exception arises under Ord. XLVIII. r. 1.

(a) Compare, however, note (s), p. 250, *ante*, as to substituted service on defendant out of England, and note at end of this chapter, as to Third Party Procedure. During the war, under the Legal Proceedings against Enemies Act, 1915 (5 Geo. 5, c. 36), special arrangements were made for service on enemy subjects in cases in which a British subject sought a declaration as to the effect of war on pre-war contracts.

Service out of England of originating summonses, petitions, or notices of motion in proceedings other than actions *in personam* are regulated by Ord. XI. r. 8a (July, 1920), under which a wide discretion is given to the Court.

(b) See, *e.g.*, as to divorce, Ord. LXVIII. r. 1 (d).

(c) *In re Busfield* (1886), 32 Ch. D. (C. A.) 123, 131, judgment of Cotton, L. J.; *In re Eager* (1882), 22 Ch. D. (C. A.) 86; *Cresswell v. Parker* (1879), 11 Ch. D. (C. A.) 601, 603, judgment of James, L. J.

(d) Subject, however, to the right of the Court to stay an action where not staying it would work injustice. See *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141; and chap. x., *post*.

the defendant is not in England, the jurisdiction of the Court is to a certain extent discretionary, for the Court may, if it see fit, in general (e) decline to allow the service (f) or even the issue of the writ (g), and thus decline to exercise its jurisdiction (h).

When leave is asked of the Court to serve a writ in Scotland or in Ireland, it is ordered that if it shall appear to the Court or a judge that there may be a concurrent remedy in Scotland or in Ireland, as the case may be, the Court or judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant or person sought to be served. The object of this Rule clearly is to protect persons living in Scotland or Ireland from the inconvenience of an action which, though it might be brought in England, would cause useless cost to such Scottish and Irish defendants (i).

Fourthly. An action may fall at the same time within more than one of these Exceptions (k). Thus an action for the breach of a contract made or to be performed in England falls within Exception 5, but if the contract be a contract affecting land in England, the action falls also within Exception 2. This may be a matter of consequence, since under Exception 2 the jurisdiction of the Court is not, whilst under Exception 5 the jurisdiction of the Court is, in one case, affected by the Scottish or Irish domicile or residence of the defendant (l).

(e) But note that the jurisdiction of the Court is not discretionary in cases falling under Exceptions 10 and 11. See pp. 272, 275, *post*.

(f) Ord. XI. r. 1.

(g) Ord. II. r. 4. Conf. *The W. A. Sholten* (1887), 13 P. D. 8.

(h) *Great Australian Co. v. Martin* (1877), 5 Ch. D. (C. A.) 1 (decided under R. S. C. 1875); *Société Générale de Paris v. Dreyfus Bros.* (1887), 37 Ch. D. (C. A.) 215, especially judgment of Lindley, L. J., pp. 224, 225. Compare *Call v. Oppenheim* (1885), 1 T. L. R. 622.

(i) Ord. XI. r. 2; *Harris v. Fleming* (1879), 13 Ch. D. 208; *Woods v. McInnes* (1878), 4 C. P. D. 67; *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142; *Ex parte McPhail* (1879), 12 Ch. D. 632; *Tottenham v. Barry* (1879), 12 Ch. D. 797; *Marshall v. Marshall* (1888), 38 Ch. D. (C. A.) 330; *Kinahan v. Kinahan* (1890), 45 Ch. D. 78; *In re Burland's Trade Mark* (1889), 41 Ch. D. 542; *Wood v. Middleton*, [1897] 1 Ch. 151; *In re De Penny*, [1891] 2 Ch. 63.

(k) *Tasseli v. Hailen*, [1892] 1 Q. B. 321, 323—325, judgment of Coleridge, C. J.

(l) Rules of Court made since 1908 have greatly increased the number of the Exceptions to Rule 60, or, in other words, have extended the jurisdiction of the Court in respect of any defendant who at the time of the service of a writ in an action is not in England.

As examples of such increase, take the fact that the Court has now jurisdiction over such defendant (I.) when sued for a breach of any contract, which either is (i) made in England, (ii) made by an agent trading or residing in

Illustrations.

1. *A* is assaulted in Boulogne by *X*, who is a French citizen, or by *Y*, who is a Jerseyman. Neither *X* nor *Y* is domiciled or is habitually resident in England. The Court has no jurisdiction to entertain an action by *A* against *X* or *Y*.

2. *X*, an Italian subject, domiciled and habitually resident in Italy, incurs a heavy debt to *A*, an Englishman, who is staying in Paris. It is agreed that the debt should be repaid at a Parisian bank within a month from the date when it was incurred. The Court has no jurisdiction to entertain an action against *X*.

3. The facts of the case are the same as in Illustration 2, with the addition that *X* has a large amount of money deposited to his credit with a bank in England. The Court has no jurisdiction to entertain an action by *A* against *X*.

4. The circumstances are the same as in Illustration 3, except that *A* brings an action in a French Court against *X*, and obtains judgment in such Court for a sum equivalent to 1,000*l*. As *X* has very little property in France, *A* is advised to bring an action in the High Court against *X*. *Seem*, the Court has no jurisdiction to entertain the action.

5. *X*, an Englishman, once domiciled and ordinarily resident in England, has acquired a domicil and ordinary residence in France. He incurs at Paris a debt to *A*, payable in France, and also assaults *A* in Paris. *X* is in France. *A* brings an action against *X* for the debt and for the assault. The Court has no jurisdiction (*m*).

Exception 1 (n).—The Court has jurisdiction to entertain an action against a defendant who is not in England,

England on behalf of a principal trading or residing out of England, (iii) which by its terms or by implication is to be governed by English law. See Ord. XI. r. 1 (e).

In any of the above cases the Court has jurisdiction even though a defendant is domiciled or ordinarily resident in Ireland.

(II.) When an action is founded on a tort committed in England. See Ord. XI. r. 1 (ee).

(*m*) This case does not fall within Exception 3, as to which see p. 258, *post*. The fact that *X* was once domiciled or ordinarily resident in England does not give the Court jurisdiction.

(*n*) Ord. XI. r. 1 (a). The first nine Exceptions to this Rule correspond with, and with slight verbal alterations reproduce, the nine cases (a) to (h) in which, under Ord. XI. r. 1, "service out of the jurisdiction [*i.e.*, out of "England] of a writ of summons, or notice of a writ of summons, may be "allowed by the Court or a judge." Ord. XI. r. 1. See App., Note 10, "Service of Writ out of England."

whenever the whole subject-matter of the action is land situate in England (with or without rents or profits), or the perpetuation of testimony relating to such land (*o*).

Comment and Illustrations.

This Exception applies where the whole subject-matter of the action is land in England.

1. *A* brings an action against *X* for the recovery of land in Middlesex (ejectment). *X* is in France. The Court has jurisdiction.

2. *A* brings an action against *X* for the recovery of land in Middlesex, and for mesne profits. The Court has jurisdiction (*p*).

3. *A* brings an action simply with a view of perpetuating evidence of the date and the legitimacy of his birth which would be necessary for supporting his claim as heir to land situate in England. The Court has jurisdiction (*q*).

Exception 2 (r).—The Court has jurisdiction (*s*) whenever any act, deed, will (*t*), contract, obligation, or liability affecting land or hereditaments situate in England, is sought to be construed, rectified, set aside, or enforced in the action.

Comment.

This Exception applies to any action in respect of any matter affecting English land.

(*o*) See, as an example of an action for perpetuation of testimony, *Slingsby v. Slingsby*, [1912] 2 Ch. (C. A.) 21. Compare *West v. Sackville*, [1903] 2 Ch. 378.

(*p*) See *Agnew v. Usher* (1884), 14 Q. B. D. 78, 79, language of Lord Coleridge, C. J.

(*q*) Contrast *Slingsby v. Slingsby*, [1912] 2 Ch. (C. A.) 21, which was decided before the provision as to the perpetuation of testimony was added to Ord. XI. r. 1 (a), and led to the addition being made.

(*r*) Ord. XI. r. 1 (b).

(*s*) Viz., to entertain an action against a defendant who is not in England. In the illustrations to all these Exceptions it is assumed that the defendant is not in England. If he were in England, Rule 60 would have no application. See Rule 59, p. 241, *ante*.

(*t*) This apparently refers to an administration action. See Rule 76, *post*, and comment thereon, p. 340, note (*q*).

The terms, however, of the Exception give rise to more than one difficulty.

When, for example, does a contract, obligation, or liability "affect land"? It has been held, on the one hand, that an action by an outgoing tenant of a farm in Yorkshire to recover from his landlord compensation for tenant right, according to the custom of the country, was an action in which a contract, obligation, or liability "affecting" land was sought to be enforced, and that the action was therefore within Exception 2 (*u*). It has been held, on the other hand, that an action to recover rent due on a lease of land in England was not an action to enforce a contract, obligation, or liability "affecting" land, and that the action, therefore, was not within Exception 2 (*x*), and the law was in this instance thus laid down:—

"I think the more reasonable construction of [Exception 2] is "to limit it to any legal proceedings—to use the largest and most "vague term—in which English land is, according to the words "of [Exception 2], to be affected. There, as the thing to be "affected is in English jurisdiction and is not in Scotch jurisdiction, recourse should be had to the English forum. I do not "pretend to give a complete or exhaustive account of all the "possible proceedings 'affecting land' which are probably within "[Exception 2]; but, according to the ordinary rules of construction and legal phraseology, an action to obtain payment of rent "certainly is not an action to enforce any 'act, deed, or will,' "and I do not think it is to enforce any 'contract, obligation, or "liability affecting land within the jurisdiction'" (*y*). But it has been said that the judgment from which this quotation is taken amounted to no more "than that the action was brought for "money due, and should be brought as a personal action in the "forum of the defendant" (*z*), and that "the decision of the Court "only came to this, that an action against the assignee of a lease "for rent due was not within" (*a*) Exception 2 (*b*).

(*u*) *Kaye v. Sutherland* (1887), 20 Q. B. D. 147.

(*x*) *Agnew v. Usher* (1884), 14 Q. B. D. 78. So held by Q. B. D.; but the judgment of the Q. B. D. setting aside the service of a writ on the defendant, though affirmed by the Court of Appeal, was affirmed on grounds which made it unnecessary to decide whether the contract or obligation affected land. See 51 L. T. (C. A.) 752.

(*y*) *Agnew v. Usher* (1884), 14 Q. B. D. 78, 80, judgment of Coleridge, C. J.

(*z*) *Kaye v. Sutherland* (1887), 20 Q. B. D. 147, 151, judgment of Charles, J. See *Tassell v. Hallen*, [1892] 1 Q. B. 321.

(*a*) *Ibid.* The Court of Appeal in *Agnew v. Usher* seems to have held that the defendants had not been proved to be assignees.

(*b*) *I.e.*, of Ord. XI. r. 1 (*b*).

It is therefore impossible to lay down with any precision what are the cases in which land is "affected" within the terms of Exception 2. Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, within sect. 4 of the Statute of Frauds, it may be assumed, affects lands; and an action to enforce such contract or sale, assuming the land to be in England, comes within Exception 2.

What, again, is the exact meaning of the terms "enforced in an action"? The suggestion has been made that they were intended to limit Exception 2 to actions for specific performance. "As I read those words, 'sought to be enforced in the action,'" says A. L. Smith, J., "they seem to mean 'specifically performed'" (c). But this suggestion cannot, it is conceived, be accepted as sound. "I should hesitate," it has been said by Mr. Justice Charles, "to narrow the operation of [Exception 2] by holding that it only applied where specific performance of some contract or obligation was sought" (d).

Illustrations.

1. A is an outgoing tenant of a farm in Yorkshire, of which X is landlord. X resides in Scotland. A brings an action against X to recover compensation for tenant right, according to the custom of the country. The Court has jurisdiction (e).

2. A brings an action against X for breach of a contract to give up the possession of a house in London to A (f). *Semble*, the Court has jurisdiction.

3. A brings an action against X for breach of a contract for sale of a business, as a brickyard, accompanied with possession of the premises where it is carried on (g). *Semble*, the Court has jurisdiction.

4. A brings an action against X for the breach of a contract for the sale of a growing crop of grass, being a natural and permanent crop not within the description of emblements or *fructus industriales* (h). *Semble*, the Court has jurisdiction (i).

(c) *Agnew v. Usher* (1884), 14 Q. B. D. 78, 81, judgment of A. L. Smith, J.
(d) *Kaye v. Sutherland* (1887), 20 Q. B. D. 147, 151.

(e) *Kaye v. Sutherland* (1887), 20 Q. B. D. 147, compared with *Agnew v. Usher* (1884), 14 Q. B. D. 78; 51 L. T. N. S. 576, (C. A.) 752.

(f) *Kelly v. Webster* (1852), 12 C. B. 283; 21 L. J. C. P. 163.

(g) *Smart v. Harding* (1855), 15 C. B. 652; 24 L. J. C. P. 76.

(h) *Crosby v. Wadsworth* (1805), 6 East, 602; 8 R. R. 566; *Carrington v. Roots* (1837), 2 M. & W. 248.

(i) These last three illustrations are merely examples of actions on contracts

5. *A* brings an action against *X* to enforce specific performance of a contract for the sale by *X* to *A*, or for the lease by *X* to *A*, of a house in London. The Court has jurisdiction.

6. *A* brings an action against *X* for the rectification of a contract for the sale by *A* to *X* of land in Middlesex. The Court has jurisdiction.

7. *A* brings an action against *X*, the assignee of a lease of a house in Middlesex, for breach of covenant to repair. *X* is resident in Scotland. The action is one in which a contract or liability affecting land in England is sought to be enforced. The Court has jurisdiction (*k*).

8. *A* brings an action against *X*, domiciled in Scotland, for one quarter's rent of a house at Liverpool, held under a lease for ten years. *A* claims the rent from *X* as assignee of the lease. *X* alleges that the assignment was to secure a debt, and that he never signed or accepted the assignment, or entered into possession. The Court has (*semble*) no jurisdiction under this Exception (*l*).

9. *X* in Ireland makes a statement, in the nature of slander of title, in respect of land owned by *A* in England. *A* brings an action against *X*. The Court has no jurisdiction (*m*).

Exception 3 (n).—The Court has jurisdiction whenever any relief is sought against any person domiciled or ordinarily resident in England.

Comment.

The extent of this Exception depends upon the meaning of the term "relief." It might conceivably be used as meaning such relief as, before the Judicature Act came into operation, was obtainable in a Court of equity, and was not obtainable at common law. It is, however, apparently used in the widest sense, and includes the recovery of a debt, or of damages in an action for breach of contract or tort (*o*). If this be so, the expression "when-

within the fourth section of the Statute of Frauds, and therefore (it is submitted) within Exception 2.

(*k*) *Tassell v. Hallen*, [1892] 1 Q. B. 321.

(*l*) *Agnew v. Usher* (1884), 14 Q. B. D. 78, affirmed 51 L. T. (C. A.) 752.

(*m*) *Casey v. Arnott* (1876), 2 C. P. D. 24. Where, under the illustrations of a particular Exception, it is stated that "the Court has no jurisdiction," the meaning is that the Court has not jurisdiction under that particular Exception.

(*n*) Ord. XI. r. 1 (*e*).

(*o*) See *Hadad v. Bruce* (1892), 8 T. L. R. 409, and the very wide meaning

“ever any relief is sought” is almost equivalent to “whenever any action is brought.” Hence domicile or ordinary residence in England is of itself a ground of jurisdiction against a defendant who might otherwise, on account of his absence from England, be exempt from the jurisdiction of the Court (*p*).

The expression “domiciled or ordinarily resident” recurs in Exception 5, and also, in a slightly different form, in Rule 69, *post* (*q*).

It is of importance, therefore, to note the distinction between “domicil” (*r*) and “residence” (*s*); and to bear in mind that the words “domicil” and “domiciled,” when employed in a Rule of Court or an Act of Parliament, are to be taken in their strict technical sense (*t*).

A man’s domicile is the country which is considered by law to be his permanent home (*u*). What is a man’s domicile is, therefore, a matter of law to be determined by strictly technical rules (*x*). It may be either a domicile of choice (*y*) or a domicile of origin (*z*); hence, under conceivable circumstances, it may happen that the jurisdiction of the Court under Exception 3, as under Exception 5, depends on the answer to the question whether the defendant’s father was or was not domiciled in England at the time of the defendant’s birth. A man’s residence, on the other hand, is

given to the term “relief” in the Petitions of Right Act, 1860 (23 & 24 Vict. c. 34), s. 16.

(*p*) In an earlier edition it was argued that the term “relief” in Exception 3 (*i.e.*, Ord. XI. r. 1 (*c*)) ought to receive a narrower interpretation and be taken to mean such relief as used to be obtainable in a Court of equity and was not obtainable in a Court of common law. But the Court does not appear to have in fact affixed this narrower interpretation to the term “relief.” It should, however, be noticed that if the term “relief” be used in its widest and popular sense, the Exception under consideration (Ord. XI. r. 1 (*c*)) may certainly, in many cases, immensely widen the jurisdiction of the Court. See Illustrations, p. 260, *post*.

(*q*) Rule 69, p. 320, is grounded on the Bankruptcy Act, 1914, s. 4, sub-s. 1 (*d*), and, to a great extent, defines the limits of the Court’s jurisdiction in matters of bankruptcy.

(*r*) See chap. ii., p. 83, *ante*.

(*s*) See p. 84, note (*e*), *ante*.

(*t*) *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418; *In re Hecquard* (1889), 24 Q. B. D. (C. A.) 71.

(*u*) See definition of “domicil,” pp. 68, 72, 83, *ante*.

(*x*) See Rules 1—18, pp. 83—147, *ante*.

(*y*) See p. 109, *ante*.

(*z*) See p. 106, *ante*.

the place or country where he in fact is habitually present (a). Where it is that a man is ordinarily resident is a matter with which legal rules have nothing to do, and which must be ascertained in the same way as any other physical fact. A man, again, may be domiciled in one country, *e.g.*, France, and may be ordinarily resident in another, *e.g.*, England. No man can be domiciled in more countries than one (b), but there exists at any rate a possibility of a person having an ordinary residence in at least two countries. This would be so if a man were, as a regular habit, to pass half of every year in England and half in France (c). "Ordinary residence" means something more than mere temporary presence in England, though exactly what amount of presence in England amounts to "ordinary residence" is a matter which scarcely admits of exact definition (d).

Illustrations.

1. *T*, a testator, dies domiciled in Ireland. *X*, *T*'s executor, is domiciled in England, but is residing in Ireland. *A*, a legatee, brings an action against *X* for the improper investment of money received under *T*'s will. The Court has jurisdiction (e).

2. *A* brings an action against *X* for the rectification of a contract made between *X* and *A*. *X* is domiciled in England, but is in France. The Court has jurisdiction.

3. *X*, an Englishman, domiciled or ordinarily resident in England, makes a promise of marriage to *A*, a Greek woman, born in Syria. *X* goes abroad. *A* brings an action for breach of promise of marriage. The Court has jurisdiction (f).

(a) See chap. ii., p. 84, note (e), *ante*.

(b) See Rule 3, p. 99, *ante*.

(c) See *In re Norris* (1888), 4 T. L. R. 452; *Ex parte Hecquard* (1889), 24 Q. B. D. (C. A.) 71. Compare Ord. XI. r. 1 (c), (d), and (e), and Bankruptcy Act, 1914, s. 4, sub-s. 1 (d). Modern legislation exhibits a tendency to base jurisdiction on domicile or ordinary residence. See *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418; *Ex parte Barne* (1886), 16 Q. B. D. (C. A.) 522.

(d) Compare *Ex parte Gutierrez* (1879), 11 Ch. D. (C. A.) 298; *Ex parte Hecquard* (1889), 24 Q. B. D. (C. A.) 71. For a case of deliberate abandonment of domicile and residence, see *Drexel v. Drexel*, [1916] 1 Ch. (C. A.) 251.

(e) See *Harvey v. Dougherty* (1887), 56 L. T. 322.

(f) *Hadad v. Bruce* (1892), 8 T. L. R. 409. The service was allowed by the Divisional Court, not on the ground that the contract was to be performed in England, *i.e.*, came within Ord. XI. r. 1 (e), as it then stood, but on the ground that it came within Ord. XI. r. 1 (c) (Exception 3). And on this very ground it was laid down that the judge could not inquire into the existence of

4. *X* is domiciled in England. *X* enters into a contract with *A*, to be performed in France. *A* brings an action against *X* for breach of contract. The Court has jurisdiction (*g*).

5. *X*'s domicile of origin, which he has never abandoned, is Scottish. He is ordinarily resident in England, where he has a house and carries on business. He is absent in France. He has incurred in England a debt to *A* of 1,000*l*. *A* brings an action for the debt. The Court (*semble*) has jurisdiction.

6. *X*, domiciled or ordinarily resident in England, assaults *A* in France. *A* brings an action for the assault. The Court has jurisdiction.

Exception 4 (h).—The Court has jurisdiction when the action is [for the administration of the personal estate of any deceased person who at the time of his death was domiciled in England] (*i*), or for the execution (as to property situate in England) of the trusts of any written instrument, of which the person to be served with a writ (defendant) is a trustee, which ought to be executed according to the law of England (*k*).

prima facie evidence of a cause of action. "There was, however, the alternative "case of a defendant domiciled or resident within the jurisdiction [*i.e.*, in "England], and he thought the judge in such a case was not warranted in "inquiring into the cause of action. There was, it appeared, a claim which "could be maintained in the Courts of this country against a person ordinarily "resident in this country; and on the plaintiff stating that she had a cause of "action against such a person, she was entitled, without more, to have a writ "of summons for service upon him out of the jurisdiction" (*i.e.*, out of England). *Ibid.*, p. 410, per Cave, J.

(*g*) Compare *Jones v. Scottish Insurance Co.* (1886), 17 Q. B. D. 421. In that case the action could not be maintained, but the reason was that the defendant was held by the Court not to be ordinarily resident or domiciled in England. See as to domicile of companies, Rule 19, p. 163, *ante*.

(*h*) Ord. XI. r. 1 (*d*).

(*i*) It is convenient to give the whole of this Exception, though the words in square brackets are best considered in the comment on Rule 76, p. 340, *post*, which refers to jurisdiction in respect of a grant of administration.

(*k*) Annual Practice, 1921, p. 90; *Winter v. Winter*, [1894] 1 Ch. 421. Compare *Wood v. Middleton*, [1897] 1 Ch. 151.

Note that the Exception has no application to a trust which ought to be executed according to the law of Scotland (Trusts (Scotland) Act, 1921 (11 & 12 Geo. 5, c. 58), s. 10) or any other country than England.

Comment.

The property subject to the trusts, or some portion of it, must be situate in England at the time when leave to serve the writ is given, or at any rate at the time of service, or when an application to the Court to set aside the service is made. Therefore, where the only property subject to the trust consisted of consols which the defendant has sold, and then left England, so that at the time of the leave being given to serve him there was no property subject to the trust nor had there been since, service was set aside.

Illustrations.

1. *N* by deed conveys leasehold and freehold property in England to *X* and *Y* in trust, on the death of *N* to sell the same and pay the proceeds to *A* and *B*. *A* and *B* bring an action against *X* and *Y* to have the trust executed. The Court has jurisdiction.

2. *X* is sole trustee of a settlement executed March, 1886. Under the trusts of the settlement, *A* is beneficially entitled to a sum of consols. Before 1st May, 1893, *X* sells the consols and leaves England, and has not returned there. There is no other property in England which is subject to the trusts of the settlement. The Court has no jurisdiction (*l*) to entertain an action by *A* for execution of the trusts of settlement.

3. *X* is sole trustee of a settlement made in Scotland, and to be executed in accordance with the law of Scotland. *A* is, under the settlement, entitled to a share in money which is in England. *X* is in Scotland. The Court has (*semble*) no jurisdiction to entertain an action by *A* for the execution of the trust.

Exception 5(m).—The Court has jurisdiction whenever the action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract [which either is]—

(*l*) *Winter v. Winter*, [1894] 1 Ch. 421.

(*m*) See Ord. XI. r. 1 (e), as amended in 1921 by R. S. C., June 23; and *Wansborough Paper Co., Ltd. v. Laughland*, [1920] W. N. 394; *Laughland v. Wansborough Paper Co., Ltd.* (1921), 1 Sc. L. T. 341, Ct. of Sess., decided before the rule was altered to exclude the case of a defendant domiciled or ordinarily resident in Scotland.

- (i) made in England, or
 - (ii) made by or through an agent trading or residing in England on behalf of a principal trading or residing out of England, or
 - (iii) by its terms or by implication is to be governed by English law,
- or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed in England of a contract wherever made, even (*n*) though such breach was preceded or accompanied by a breach out of England which rendered impossible the performance of the part of the contract which ought to have been performed in England.

Comment and Illustrations.

This Exception is based upon Ord. XI. r. 1 (e). It needs some explanation, and it will be well, therefore, to study with care the words of the Rule upon which the Exception is grounded, and read with the Exception *Wansborough Paper Co. v. Laughland* (*o*) and *Johnson v. Taylor Bros.* (*p*), both of which elucidate its meaning. The following points should be particularly noticed:—

(1) The Exception applies to four combinations of circumstances or cases (*q*).

First Case.—Where a contract is made in England.

X, for example, makes a contract in London with *A*. *X* breaks the contract out of England. It makes no difference in this instance whether the contract is broken in England or in a foreign country, or whether *X* be a British subject or an alien, *e.g.*, a French citizen or a citizen of the United States.

Second Case.—Where a contract is made through an agent, *N*, trading or residing in England, on behalf of a principal trading

(*n*) The remainder of this exception renders *Johnson v. Taylor Bros.*, [1920] A. C. 144, obsolete. Hence the Court has jurisdiction in respect to any action on contract with regard to which any breach whatever is committed in England.

(*o*) [1920] W. N. 394.

(*p*) [1920] A. C. 144.

(*q*) The word "case" is not here used with the meaning of a matter decided by the judgment of the Court, but simply as one of three circumstances which gives the Court under this exception jurisdiction to entertain an action where a defendant is not in England.

or residing in a foreign country, *e.g.*, France or the United States, with any person trading or residing anywhere.

Thus *Y*, trading or residing in Jersey, makes a contract, through an agent, *N*, trading and residing in London, with *A*, who may be in or out of England. It is to be noted that while the agent whom *X* employs must, to come within this Case, be trading or residing in England, and the person who makes a contract through such agent must be trading or residing out of England, *A*, the other party to the contract, may make it wherever he happens to be. Thus, if *N*, the agent trading, &c. in London, acting on behalf of *X*, residing, *e.g.*, in France, bargains by letter that *X* will supply goods of a certain value to *A*, who is then travelling for pleasure from Paris to Rome, and *A* receives *X*'s offer when in Rome or in Naples, the Court has jurisdiction. Supposing, however, it turns out that *X* is at the moment when he employs *N* neither trading nor residing in a foreign country, but is residing in England, the Court has not in this case any jurisdiction under this Exception.

Third Case.—Where the contract is by its terms or by implication to be governed by English law.

A, an Englishman, and *X*, a French citizen, contract in writing that *A* shall provide a house in England for *X* at a certain rent, and that *X* shall pay the rent quarterly to *A* in England. *A* provides a house, but *X* does not pay the rent. The Court has jurisdiction.

If there be no definite statement in the contract as to the country where the money is to be paid, it is implied by English law that the money must be paid by *X* to *A* in England. The Court has jurisdiction.

In these three Cases jurisdiction cannot be exercised against a defendant domiciled or ordinarily resident in Scotland (*r*).

Fourth Case.—Where an action is brought for the breach in England (*s*) of any contract against a defendant not domiciled or ordinarily resident in Scotland or in Ireland (*t*).

(*r*) This restriction was not contained in the rule as enacted in 1920, but was added in 1921.

(*s*) As to when a contract is broken in England, compare *Holland v. Bennett*, [1902] 1 K. B. (C. A.) 867; the termination of a contract by a letter written abroad is not a breach within the jurisdiction. Failure to pay is a breach within the jurisdiction. *O'Mara, Ltd. v. Dodd*, [1912] 2 Ir. R. 55. Contrast *Anger v. Vasnier* (1902), 18 T. L. R. (C. A.) 596; *Comber v. Leyland*, [1898] A. C. 524. See also Conflict (2nd ed.), pp. 233—241.

(*t*) This case is not enumerated in sub-rule (e) of Ord. XI. r. 1, but results

1. *X*, a French citizen, makes a contract in Jersey with *A*, a French citizen, to do certain work for *A*, and *A* contracts to pay *X* a certain price in London for the work done. Either *A* or *X* breaks his part of the contract. The Court has jurisdiction.

2. The circumstances are the same as in the foregoing Illustration, except that *A*, though a French citizen and though he breaks the contract in England by refusing to pay for the work done, in England, is domiciled or ordinarily resident in Scotland or Ireland. The Court (*semble*) has no jurisdiction (*u*).

Exception 6 (*x*).—The Court has jurisdiction whenever the action is founded on a tort committed in England.

Comment and Illustration.

The meaning of this Exception is best seen from the following Illustration:—

A is assaulted in England, or is libelled in England, by *X*, who then goes, *e.g.*, to France and does not return to England. The Court has jurisdiction to entertain an action by *A* for the assault or for the libel, and it makes no difference in this matter what is *X*'s nationality.

This Exception clearly does not cover the case of an assault upon *A*, or a libel on *A*, by *X*, committed in Paris. If the Court has jurisdiction to entertain such an action it must arise, if at all, under Exception 3 (*y*).

Exception 7 (*z*).—The Court has jurisdiction whenever any injunction is sought as to anything to be done in England, or any nuisance in England is sought

from the language of the second paragraph of that rule which is reproduced in Exception 5.

(*u*) See *Lenders v. Anderson* (1883), 12 Q. B. D. 50; *Watkins v. Scottish Imperial Co.* (1889), 23 Q. B. D. 285.

(*x*) See Ord. XI. r. 1 (ee). Contrast *In re Smith* (1876), 1 P. D. 300; *The Vivar* (1876), 2 P. D. 29, decided under the former state of the law.

(*y*) See Exception 3 and Comment, pp. 258—260, *ante*.

(*z*) Ord. XI. r. 1 (f).

to be prevented or removed, whether damages are or are not also sought in respect thereof.

Comment.

The injunction sought for should have reference to something to be done in England, or to a nuisance in England, and must be the substantial relief claimed (*a*).

Illustrations.

1. X, resident in Dublin, sends cards to A in London, through the post-office and otherwise, containing libellous and defamatory matter. A brings an action claiming an injunction to restrain X from sending such post-cards, and also claiming damages. The Court has jurisdiction (*b*).

2. X & Co. carry on business in Scotland, having a registered office in Glasgow. X & Co. at Manchester infringe A's trade-mark. A brings an action to restrain infringement. The Court has jurisdiction (*c*).

3. A is the patentee of a particular kind of watch-case. X, in Glasgow, sells watch-cases of the patented kind in Scotland, and also in England, and particularly in Liverpool and in Manchester. X also, in answer to applications by customers in England, sends the patented watch-cases to England in return for payment in Scotland. A brings an action against X for infringement of patent, and to obtain injunction against infringement of patent by X in England. The Court has jurisdiction (*d*).

4. X resides in Scotland, and there contracts with A & Co., an English company, to perform certain services in the Transvaal at a salary. He goes to the Transvaal, but returns thence before he has fully performed his contract. A & Co. refuse to pay X

(*a*) Compare *In re De Penny*, [1891] 2 Ch. 63; *Watson v. Daily Record*, [1907] 1 K. B. 853; *De Bernales v. New York Herald*, [1893] 2 Q. B. (O. A.) 97 (n.); *Alexander & Co. v. Valentine & Sons* (1908), 25 T. L. R. 29.

(*b*) *Tozier v. Hawkins* (1885), 15 Q. B. D. 650; (O. A.) 680. Compare the judgment of the House of Lords on the similar rule of Court in Ireland, *Dunlop Rubber Co. v. Dunlop*, [1920] 1 Ir. R. 280; [1921] A. O. 367. See also *Alexander & Co. v. Valentine & Sons* (1908), 25 T. L. R. 29.

(*c*) *In re Burland's Trade Mark* (1889), 41 Ch. D. 542. Compare *Marshall v. Marshall* (1888), 38 Ch. D. (O. A.) 330.

(*d*) *Speckhart v. Campbell*, [1884] W. N. 24; *Chemische Fabrik v. Badische Anilin und Soda Fabrik* (1904), 20 T. L. R. 552. Compare *In re Burland's Trade Mark* (1889), 41 Ch. D. 542; and *Kinahan v. Kinahan* (1890), 45 Ch. D. 78.

part of salary which he claims. *X* threatens a petition for the winding-up of *A & Co.* *A & Co.* bring an action against *X*, claiming (1) rescission of contract, (2) return of moneys paid, (3) injunction to restrain *X* from presenting petition. The Court has jurisdiction (*e*).

5. *N*, a trader in England, orders goods from *X*, a foreign manufacturer in Switzerland. *X* addresses the goods to *N* in England and delivers them to the Swiss post-office by which they are forwarded to England. The goods are manufactured by *X* according to an invention protected by an English patent. An action by *A*, the patentee, against *X* claiming an injunction against infringement of patent. The Court has no jurisdiction (*f*).

Exception 8(g).—Whenever any person (*h*) out of England is a necessary or proper party to an action properly brought against some other person duly served with a writ in England, the Court has jurisdiction to entertain an action against such first mentioned person as a co-defendant in the action.

Comment.

It may be necessary or proper that a plaintiff, *A*, should make not only one person, *X*, but also some other person, *Y*, defendant in an action. This is so, for example, where *X* and *Y* are joint debtors, or where *A* has a claim, alternatively, either against *X* or *Y*. Under these circumstances, one of the defendants, *X*, may be in England and be duly served with a writ, whilst the other defendant, *Y*, may be out of England, so that it is impossible to

(*e*) *Lisbon Berlyn Gold Fields v. Heddle* (1885), 52 L. T. 796. *Seem*, that the claim for an injunction justifies jurisdiction though *X* resides in Scotland. See Ord. XI. r. 2; *In re De Penny*, [1891] 2 Ch. 63; *Waygood & Co. v. Bennie* (1885), 12 R. 651, Ct. of Sess.

(*f*) The sale and delivery of the goods by *X* was complete on their being delivered to the post-office in Switzerland. Nothing was done by *X* in England for which *A* had a right of action. *Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler*, [1898] A. C. 200. *Aliter* if *X* had brought the goods to England and there sold them. *Seem*, in the particular case, that (1) there was neither a right of action against *X* if (*e.g.*) he had appeared before the Court, nor (2) a right to serve him with process out of England.

(*g*) Compare the language of Ord. XI. r. 1 (*g*).

(*h*) A foreign partnership is not a person within the meaning of this Exception, and service must be effected on the individual partners. See *Hellfeld v. Rechnitzer*, [1914] 1 Ch. (C. A.) 748.

effect service on him in England. This is the state of things to which Exception 8 applies.

In order that under these circumstances the Court may have jurisdiction within Exception 8, three conditions must be fulfilled:—

First. There must be an action properly brought against X, the original defendant. By “properly brought” is meant that it is brought against X as a principal or substantial defendant. He must not be, that is to say, a person against whom the action is brought for the sake of giving the Court jurisdiction over his co-defendant, Y (*i*).

The original action may be an action for a tort (*k*).

Secondly. X must be duly served with the writ in England.

It would appear to follow that Exception 8 has no application either where all the defendants, or none of the defendants, in an action, are in England. It is applicable, in other words, only where one at least of the defendants is in England and one at

(*i*) See, especially, *Yorkshire Tannery v. Eglinton Co.* (1884), 54 L. J. Ch. 81. “I think,” says Pearson, J., “that if I had such an application [*i.e.*, an application to allow, under Ord. XI. r. 1 (g), service of a writ on a defendant in Scotland] before me, I should require it to be shown that the person . . . served within the jurisdiction [*i.e.*, the original defendant, X] was either the principal defendant, or at least as much a substantial defendant as the person sought to be served out of the jurisdiction. I cannot think that it is the intention of this Rule of Court to bring into this country an action which was properly a Scotch action, simply because some person who had some trifling interest in the matters in dispute, and who was not a principal defendant, was made a defendant and was resident here. I think that the Order means that where there is a proper English action, in which the party substantially sued is resident here, and in which some other party [Y] who is out of the jurisdiction is sued in respect of some trifling claim, then that person [Y] may be served out of the jurisdiction.” *Ibid.*, p. 83. See and compare *Tassell v. Hallen*, [1892] 1 Q. B. 321; *Collins v. North British, & Co. Ins. Co.*, [1894] 3 Ch. 228.

In order to appreciate the bearing of Mr. Justice Pearson's language, it must be remembered that the question actually before the Court is the technical question whether leave should be granted to serve a writ out of England under Ord. XI. r. 1 (g); that this, however, involves a question of jurisdiction, and that Exception 8 is based on Ord. XI. r. 1 (g). There does not, it must be added, appear to be authority for the suggestion that the interest of Y in the matters in dispute need be trifling. See also *Witted v. Galbraith*, [1893] 1 Q. B. (C. A.) 577; *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283; *The Duc d'Aumale*, [1903] P. (C. A.) 18, where the defendant out of the jurisdiction was the more important; *Bawtree v. Great North West Central Railway* (1898), 14 T. L. R. 448.

(*k*) *Croft v. King*, [1893] 1 Q. B. 419; *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142.

least of the defendants is not in England (*l*). Hence, where Exception 8 applies, the Court may have jurisdiction to entertain an action against a person over whom, if the action had been brought against him alone, the Court would have had no jurisdiction (*m*).

Thirdly. *Y*, who is out of England, must be either a necessary or proper party to the action.

The question whether *Y* is a proper party to an action against *X* depends on this: Supposing both *X* and *Y* had been in England, would they both have been proper parties to the action? If they would, and only one of them, *X*, is in this country, then, under our Exception, the Court has jurisdiction to entertain an action against the other, *Y*, just as if he had been in this country (*n*).

"If a person is mixed up in a transaction carried out in this country by English subjects, I see no reason why he should not be dealt with, for the purpose of service of process, as if he was amenable to the jurisdiction of the Courts here. If he does not choose to submit to the jurisdiction he must take his chances, and no remedy will be effective against him unless he has property in this country. I see no particular hardship in saying that he must come to the Courts of this country if he wishes to defend himself" (*o*).

Exception 8 applies to a defendant domiciled or ordinarily resident in Scotland (*p*) or Ireland.

(*l*) Whether it may apply where both defendants are out of England, but one of them, *X*, is served with a writ out of England under some other clause of Ord. XI., *e.g.*, under clause (c) (Exception 3) as a person domiciled in England? The words of Ord. XI. r. 1 (g) seem to show that this question must be answered in the negative, for in the supposed case the original defendant, *X*, is not served within the jurisdiction. In *Harvey v. Dougherty* (1887), 56 L. T. 322, a contrary opinion seems to be expressed or implied; but see *John Russell & Co., Ltd. v. Cayzer, Irvine & Co., Ltd.*, [1916] 2 A. O. 298, which decides that the submission of one of two defendants in Scotland is no ground for jurisdiction over the other.

(*m*) *Williams v. Cartwright*, [1895] 1 Q. B. (C. A.) 142, 145, judgment of Esher, M. R.; and *p. 148*, judgment of Rigby, L. J.

(*n*) See *Massey v. Heynes* (1888), 21 Q. B. D. (C. A.) 330, 338, judgment of Esher, M. R.; *Jenney v. Mackintosh* (1886), 33 Ch. D. 595; *In re Lane* (1886), 55 L. T. 149; *Collins v. North British Mercantile Insurance Co.*, [1894] 3 Ch. 228; *Duder v. Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; *The Duc D'Aumale*, [1903] P. (C. A.) 18; *Oesterreichische Export, &c. Co. v. British Indemnity Co., Ltd.*, [1914] 2 K. B. (C. A.) 747; *In re Beck, Attia v. Seed* (1917), 87 L. J. Ch. 335; *Joynt v. McCrum*, [1899] 1 Ir. R. 217.

(*o*) 21 Q. B. D., *p. 334*, judgment of Wills, J.

(*p*) See *The Washburn, &c. Co. v. The Cunard Co. & Parkes* (1889), 5

Illustrations.

1. *X*, on instructions from *Y*, enters, as agent for *Y*, into a contract with *A*. The contract is made in London, and is to be performed out of England. *Y* repudiates the contract. *A* brings an action against *X*, who is in England, for breach of warranty that *X* was authorised to contract for *Y*, who is in Austria, and has an alternative claim against *Y* if *X* was authorised to contract for him. The Court has jurisdiction to entertain an action against *Y* as co-defendant with *X* (*q*).

2. *A* brings an action against *X* and *Y* for breach of agreement to convey to *A* their respective shares in partnership formerly carried on by *A*, *X*, and *Y*. *X* is served with a writ in England. *Y* is in the United States. *Y* is a necessary or proper party to the action. The Court has jurisdiction (*r*).

3. *A & Co.*, an American company, own a patent for barbed wire. *Y*, carrying on business in Ireland, buys from *N*, in America, wire which is an infringement of *A & Co.*'s patent. *X & Co.*, a steamship company, carry the wire for *Y* and land it at Liverpool for trans-shipment to *Y* in Ireland. *X & Co.* are an English company. *A & Co.* bring an action against *X & Co.* to obtain injunction against their dealing with the wire. Application for leave to add *Y* and serve *Y* with writ and notice in Ireland. The Court has jurisdiction (*s*).

4. *A* brings an action of deceit against *X* and *Y* in respect of a fraud jointly committed by them in London. *X* is in England. *Y* is domiciled and resident in Scotland. *X* has been served with the writ, and *Y* is a necessary and proper party to the action. The Court has jurisdiction (*t*).

5. *A* brings an action against *X*, residing in England, and

T. L. R. 592, judgment of Stirling, J.; *Lopez v. Chavarri*, [1901] W. N. 115; *Massey v. Heynes* (1888), 21 Q. B. D. (C. A.) 330, with which contrast language of Grove, J., and Huddleston, B., in *Speller v. Bristol Co.* (1884), 13 Q. B. D. 96, 98, 99. But see *Harvey v. Dougherty* (1887), 56 L. T. 322.

(*q*) *Massey v. Heynes* (1888), 21 Q. B. D. (C. A.) 330. Contrast *Indigo Co. v. Ogilvy*, [1891] 2 Ch. (C. A.) 31.

(*r*) *Lightowler v. Lightowler* (1884), W. N. 8. "The person whom it is sought to serve is resident out of the jurisdiction [*i.e.*, out of England]; and the action, as against him, is founded on a breach of contract by him out of the jurisdiction [*i.e.*, out of England]. But it is stated that [*X*], the other defendant, has been duly served within the jurisdiction [in England]; and, "as this is a partnership matter, I think that [*Y*] is a necessary or proper party." *Ibid.*, judgment of Butt, J.

(*s*) *Washburn, &c. Co. v. Cunard Co. & Parkes* (1889), 5 T. L. R. 592.

(*t*) *Williams v. Cartwright*, [1895] 1 Q. B. (O. A.) 142.

against Y, domiciled or ordinarily residing in Scotland. Before X is served with the writ, A applies for leave to serve the writ on Y in Scotland. The Court has no jurisdiction (u).

6. N, who carries on business in London, deposits policies of life insurance with A & Co., a German bank, as security for advances made to him. N afterwards creates a second charge on same policies in favour of Y, who resides in Germany. A & Co. subsequently acquire the equity of redemption in the policies and transfer it to X, resident in England, as trustee for A & Co. An action for foreclosure is then brought against X by A & Co., who then apply for leave to add Y as defendant and serve notice of writ on Y in Germany. The Court has no jurisdiction (x).

Exception 9 (y).—The Court has jurisdiction when the action is brought by a mortgagee or mortgagor in relation to the mortgage of personal property situate in England, and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee, but does not seek (unless and except so far as permissible under Exception 5 (z)) any personal judgment or order for payment of any monies due under the mortgage.

Comment.

This Exception, which follows the wording of Ord. XI. r. 1 (h), makes good a defect arising from the fact that an action, e.g., for foreclosure, in respect of a mortgage of personal property, is not regarded by English law as an action founded on a breach of contract, whether or not the mortgage deed provides expressly for the payment of interest on the sum in respect of which the mortgage is created and the repayment of the principal. This view, of course, rests on the fact that the mortgagee is, strictly

(u) See *The Yorkshire Tannery v. Eglinton Co.* (1884), 54 L. J. Ch. 81.

(x) *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283. No actual relief was claimed against X, who was therefore not properly made a defendant, but should have been joined as co-plaintiff. The action therefore was not properly brought against X. Hence Exception 8 does not apply.

(y) Ord. XI. r. 1 (h), added in July, 1916; Annual Practice, 1921, p. 103.

(z) Except as permissible under Ord. XI. r. 1 (e).

speaking, the legal owner of the property, the subject of the mortgage, and an action for foreclosure is founded on his ownership, not on a breach of contract, though such a breach is the occasion for the action to assert the right of ownership. There is obviously no good ground for refusing to exercise jurisdiction in the case of an action of this kind, and the *casus omissus* is now made good.

Illustrations.

1. *X*, as beneficial owner, conveyed to *A* by way of mortgage his interest in personalty under an English marriage settlement, in order to secure a loan and the interest payable on it. Both *X* and *A* were then resident in England, but *X* is now residing in Australia. *A* issues an originating summons against *X* claiming an account of the sum due under the mortgage deed and enforcement of payment of that sum by foreclosure or sale, and applies to the Court for leave to serve the summons on *X* in Australia. The Court may allow service (*a*).

2. *A & Co.*, bankers, carrying on business in England, claim as against *X*, residing in Germany, a declaration that they are entitled to a charge on certain policies of life assurance deposited with them, and that the said charge may be enforced by foreclosure. The Court has jurisdiction (*b*).

3. *A*, having obtained judgment against *X* for 2,000*l.*, obtains an order charging the judgment debt with interest on *X*'s shares in a public company in England. *X* is resident in America. In order to enforce the charge *A* institutes an action asking for the sale of the shares. The Court has jurisdiction (*c*).

Exception 10 (d).—Notwithstanding anything contained in any of the Exceptions to Rule 60, the parties to

(*a*) Contrast *Hughes v. Oxenham*, [1913] 1 Ch. (C. A.) 254, which was decided in the opposite sense under Ord. XI. r. 1 (*e*), and in which an alteration of the rules to cover such cases was suggested.

(*b*) Contrast *Deutsche National Bank v. Paul*, [1898] 1 Ch. 283, decided under the old rules.

(*c*) Contrast *Kolchmann v. Meurice*, [1903] 1 K. B. 534. As to charging orders, see the Judgments Act, 1838 (1 & 2 Vict. c. 110), ss. 14, 15; Ord. XLVI. r. 1.

(*d*) Ord. XI. r. 2*a*; this rule was made to remove the inconvenience resulting from the decision in *British Wagon Co. v. Gray*, [1896] 1 Q. B. 35, by the Court of Appeal that an agreement by a person domiciled or ordinarily resident in Scotland providing for the service on him of an English writ of summons in respect of the breach of such agreement would be invalid, although,

any contract may agree (a) that the Court shall have jurisdiction to entertain any action in respect of such contract, and, moreover, or in the alternative, (b) that service of any writ of summons in any such action may be effected at any place within or out of England, on any party or on any person on behalf of any party or in any manner specified or indicated in such contract. Service of any such writ of summons at the place (if any) or on the party or on the person (if any) or in the manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident, and if no place or mode or person be so specified or indicated, service out of England of such writ may be ordered.

Comment.

This Exception follows and is based upon the language of Order XI. r. 2a. Though not free from ambiguity, it seems that the net effect thereof is to extend the jurisdiction of the Court to any case in which the parties have either expressly or implicitly agreed to accept such jurisdiction. This provision is in accordance with the principle (e) that a Court has jurisdiction over any person who by his conduct has precluded himself from objecting to its jurisdiction.

Two cases are to be distinguished:—

(a) The parties to a contract may expressly agree that the Court shall have jurisdiction to entertain an action in respect of such contract, and may further agree as to the manner in which a writ of summons in such an action is to be served. If any dispute arises in regard to the contract, the Court will have jurisdiction to entertain an action against a defendant resident out of England, provided that service of the writ of summons is effected in the manner provided for in the agreement (if any) between the parties. If no agreement has been made on this head the Court

had the agreement been for service on an agent in England, service there would have been valid. *Montgomery, Jones & Co. v. Liebenthal & Co.*, [1898] 1 Q. B. 487.

(e) See Rule 56, p. 235, *ante*.

D.

may order service of a writ out of England. It must, however, be noted that the Court has no power to order such service (if there is an agreement as to the mode of service) otherwise than as provided by the agreement.

(b) Without expressly agreeing that the Court shall have jurisdiction in respect of a contract, the parties may agree as to the mode in which service of a writ of summons in any action arising out of the contract may be effected. If the mode of service is followed as prescribed in the agreement, the Court will have jurisdiction over a defendant resident out of England. The Court, however, has no power to order service out of England in such a case; its jurisdiction depends entirely on the precise carrying out of the agreement between the parties.

The following observations deserve attention:—

Observation 1.—Where an agreement as to service of a writ has been made by the parties, the writ may be served in any place, on any person, and in any manner consistent with the agreement, and without any application to the Court. The Court, however, on an application by the defendant would doubtless set aside any service which was not in accordance with the agreement, and probably also any service based on what the Court considered unreasonable terms in the agreement as to service. In cases where the Court has power to order service, the exercise of this power is entirely discretionary.

It may be noted that when this Exception is applicable, the fact that the defendant is domiciled or ordinarily resident in Scotland or Ireland, is no bar to the jurisdiction.

Observation 2.—Though no express provision is made that an agreement to come within the application of this Exception must be in writing, it is obvious that, in default of a written agreement, it would often be impossible to establish the existence or the precise terms of such an agreement.

Observation 3.—The giving to the Court jurisdiction to entertain an action on contract does not in general affect the law by which the meaning of the contract is to be determined. There exists, however, one important limitation to this principle. An English Court gives a wide extension to the rule that matters of procedure are governed by the *lex fori*, and hence treats the limitation of the time within which an action or other proceeding must be brought, as a matter of procedure. The result is that an action on a French contract, *i.e.*, one made in France and wholly

to be performed in France, if brought within the jurisdiction of the Court, will be barred by the English and not by the French rule regarding the time within which such an action must be brought.

Illustrations.

1. *A* and *X*, resident in England, make a contract in France for the carrying out of certain work by *X* in that country, and agree that the Court shall have jurisdiction in any action arising out of the contract. *X* takes up his permanent residence in France and acquires a French domicile. *A* brings an action for *X*'s failure to carry out his part of the contract. The Court has jurisdiction (*f*).

2. *A*, resident in England, contracts in Edinburgh with *X*, resident and domiciled in Scotland, for the erection by the latter of a house there. It is agreed that a writ of summons arising out of the contract may be served by being sent by post to *X* at his business address. On default by *X*, *A* initiates an action by sending a writ to *X* in the prescribed manner. The Court has jurisdiction.

3. The circumstances are the same as in Illustration 2, except that the writ is sent by post to *X* in Dublin, where he has established his residence. The Court has no jurisdiction.

Exception 11 (g).—The Court has jurisdiction to entertain an action against any two or more persons being liable as co-partners, and carrying on business in England, when sued in the name of the firm (if any) of which such persons were co-partners at the time of the accruing of the cause of action.

Comment.

This Exception is grounded on Ord. XLVIII. rule 1 (*h*).

(*f*) The case does not fall within Exception 3 or Exception 5, and save for the agreement, the Court would have no jurisdiction.

(*g*) Ord. XLVIII. rr. 1, 3; *Worcester, &c. Banking Co. v. Firkbank*, [1894] 1 Q. B. (C. A.) 784. Compare *Grant v. Anderson*, [1892] 1 Q. B. (C. A.) 108; *Russell v. Cambefort* (1889), 23 Q. B. D. (C. A.) 526, which, however, was decided under repealed Ord. IX. r. 6.

(*h*) "Any two or more persons claiming or being liable as co-partners, and "carrying on business within the jurisdiction, may sue or be sued in the name "of the respective firms, if any, of which such persons were co-partners at the

The Order appears indeed at first sight to do little more than allow and regulate "actions by and against firms and persons "carrying on business in names other than their own;" and not to touch the extent of the Court's jurisdiction. But Ord. XLVIII. rule 1, has in reality a wider effect, at any rate as regards actions against partnerships, than this, and in such actions may extend the jurisdiction of the Court over defendants who are absent from England. For the Order provides, in actions against a firm carrying on business in England in a firm name, a mode of serving the writ at the firm's place of business in England which is applicable whether the members of the partnership be in England or not. Hence, in actions within Ord. XLVIII. rule 1 (*i.e.*, Exception 11), the Court has, in effect, jurisdiction to entertain actions against persons who are not resident in England (*i*).

As to this Exception, the following points deserve notice.

(1) Exception 11 applies only to partners *carrying on business in England*, and carrying it on under a firm name (*k*).

(2) Exception 11 extends to a firm, all or any of whom are foreigners or aliens. "If the firm carries on business [in England], then, whether it is an English or a foreign firm, and "whether it also carries on business in a colony or abroad or not, "a writ may be issued against the partners in the firm name "without leave, under Ord. XLVIII. r. 1" (*l*), *i.e.*, Exception 11 applies.

"time of the accruing of the cause of action; and any party to an action may "in such case apply by summons to a judge for a statement of the names and "addresses of the persons who were, at the time of the accruing of the cause "of action, co-partners in any such firm, to be furnished in such manner, and "verified on oath or otherwise, as the judge may direct." Ord. XLVIII. r. 1.

(*i*) As to connection between rules as to the service of a writ and the jurisdiction of the Court, see *Heinemann v. Hale*, [1891] 2 Q. B. 83, 86, 87, judgment of Cave, J.; *John Russell & Co., Ltd. v. Cayzer, Irvine & Co.*, [1916] 2 A. C. 298, 303, judgment of Lord Haldane; *In re King & Co.'s Trade Mark*, [1892] 2 Ch. 462, 483; *Pemberton v. Hughes*, [1899] 1 Ch. (C. A.) 781, 792, per Lindley, M. R.; *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin*, [1914] 1 P. 53, 64; and pp. 242, 251, 252, *ante*.

(*k*) See note (*h*), *supra*; *Hellfeld v. Rehnitzner*, [1914] 1 Ch. (C. A.) 748; *Singleton v. Roberts* (1894), 70 L. T. 687; *Dobson v. Festi, Rosini & Co.*, [1891] 2 Q. B. (C. A.) 92.

(*l*) *Worcester & Co. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784, 788, judgment of Esher, M. R.; and p. 780, judgment of Davey, L. J., dissenting from opinion of Coleridge, C. J., and Wright, J., in *Grant v. Anderson*, [1892] 1 Q. B. 108; and contrast *Western National Bank, & Co. of New York v. Perez*, [1891] 1 Q. B. (C. A.) 304, and *Indigo Co. v. Ogilvy*, [1891] 2 Ch. (C. A.) 81, decided before Ord. XLVIII. r. 1, came into force.

(3) Under Exception 11, the jurisdiction of the Court is not discretionary, for the writ may be served by the plaintiff in the way directed by the Order without leave of the Court (*m*).

(4) Exception 11 extends to cases which may not fall within any of the foregoing ten Exceptions (*n*).

Question.—Has the Court jurisdiction in cases not falling within Exceptions 1 to 10 (*i.e.*, not falling within Ord. XI. rr. 1, 2a) to entertain an action against an individual who is not in England, but who carries on business in England in a name or style other than his own name?

This inquiry is suggested by the very wide terms of Ord. XLVIII. rule 11, which runs as follows: "Any person "carrying on business within the jurisdiction in a name or "style other than his own name may be sued in such name or "style, as if it were a firm name; and, so far as the nature of "the case will permit, all rules relating to proceedings against "firms shall apply."

The inquiry must be answered in the negative. If the defendant is not in England, whether he be, *e.g.*, a Frenchman (*o*), a domiciled Scotsman, or (it is submitted) an Englishman, the jurisdiction of the Court is not extended by his use in England of a trade name. In such circumstances, "A person "desiring to proceed against a single person, if he is a foreigner "or a Scotsman [or an Englishman], must go under Ord. XI. "[*i.e.*, under Exceptions 1 to 10], and cannot proceed under Ord. "XLVIII. rule 11" (*p*), *i.e.*, under Exception 11. That is the substance and principle of the thing.

(*m*) *Ibid.* But the service must be effected exactly in the way prescribed by Ord. XLVIII. r. 3.

(*n*) Note that, in an action against a firm in the firm name, execution can as a rule, as regards partners who are not in England, issue only against the property of the partnership which is in England (Ord. XLVIII. r. 8), and not against the property of such absent partners which is not property of the partnership, unless, of course, under Ord. XI. r. 1, service out of England has been permitted on such partners.

(*o*) *St. Gobain, & Co. v. Hoyerermann's Agency*, [1893] 2 Q. B. (C. A.) 96.

(*p*) *MacIver v. Burns*, [1895] 2 Ch. (C. A.) 630, 635, per Lindley, L. J.

Contrast *St. Gobain, & Co. v. Hoyerermann's Agency*, [1893] 2 Q. B. (C. A.) 96, and *MacIver v. Burns*, interpreting Ord. XLVIII. r. 11, with *Worcester, & Co. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784, interpreting Ord. XLVIII. r. 1.

Illustrations.

1. *Y* and *Z* carry on business in London under the firm name of *X & Co.* *A* brings an action against *X & Co.* for the breach of a contract made by *X & Co.* with *A* to carry goods for *A* from France to America. *Y* and *Z* are neither of them in England. The Court has jurisdiction to entertain the action (*q*).

2. *Y* and *Z* are residing in Natal. They carry on business under the firm name of *X & Co.* both in Natal and in England. *A* sues *X & Co.* upon a promissory note made by *Y* and *Z* in Cape Town and payable at their London office, and *A* issues a writ against them in the name of *X & Co.* The Court has jurisdiction to entertain the action (*r*).

(*q*) See *Worcester, & Co. Banking Co. v. Firbank*, [1894] 1 Q. B. (C. A.) 784. It would apparently have made no difference if *Y* and *Z* had been aliens, *e.g.*, Frenchmen, carrying on business both in France and in England. *Ibid.*, pp. 787, 788, judgment of Esher, M. R.

(*r*) *Ibid.*

NOTE.

THIRD PARTY PROCEDURE.—R. S. C. Ord. XVI. rr. 48—55. Where a defendant in an action claims to be entitled either to *contribution* or to *indemnity* against any person not a party to the action (called hereinafter a third party), the Court may in its discretion issue a notice to be served on the third party, and thus exercise jurisdiction, in the manner provided by Ord. XVI. rr. 48—55, over such third party. For the procedure in such case, the object of which is to enable a defendant in an action to establish conveniently his claim to contribution or indemnity against a third party who may not be a party to the action, the reader is referred to the Rules of Court, and works on practice. See as to nature of claim, *Edison, &c. Co. v. Holland* (1889), 41 Ch. D. (C. A.) 28; *Eden v. Weardale, &c. Co.* (1887), 35 Ch. D. (C. A.) 287; *Johnston v. Salvage Association* (1887), 19 Q. B. D. (C. A.) 458; *Speller v. Bristol Steam Co.* (1884), 13 Q. B. D. (C. A.) 96. What is to be noted as regards the jurisdiction of the Court is, that its exercise is discretionary; that, within the limits laid down by Ord. XVI. rr. 48—55, it can be exercised over a third party who is not in England, subject, however, to this limitation, that it cannot be exercised in regard to a third party domiciled or ordinarily resident in Scotland or Ireland, when, if he were a defendant, the Court would not have jurisdiction over him, *i.e.*, in cases solely within the latter part of Exception 5. Ord. XI. r. 1 (e).

Third party procedure which originates in the Judicature Act, 1873, s. 24, sub-s. 3, is, as regards service out of England of a third party notice issued by a defendant under Ord. XVI. r. 48, governed by Ord. XI. r. 1, so that a defendant can obtain leave to serve such notice on a third party out of England only when the subject-matter of his claim falls under one or other of the specific cases enumerated in Ord. XI. r. 1 (see Rule 60, Exceptions 1 to 9) in which service of a writ out of England will be allowed. *McCheane v. Gyles*, [1902] 1 Ch. (C. A.) 287; *Swansea Shipping Co. v. Duncan* (1876), 1 Q. B. D. (C. A.) 644; *Dubout, &c. Co. v. Macpherson* (1889), 23 Q. B. D. (C. A.) 340.

CHAPTER VI.

ADMIRALTY JURISDICTION IN *REM* (a).

RULE 61 (b).—The Court has jurisdiction to entertain an action *in rem* against any ship, or *res* (such as cargo) connected with a ship, if

- (1) the action is an admiralty action; and
- (2) the ship or *res* is in England (c), or within three miles of the coast of England, and not otherwise.

Comment.

All actions in the Courts of common law, at any rate after the passing of the C. L. P. Act, 1852, were, as all the actions in the King's Bench Division of the High Court now are, proceedings *in personam* (d). The only strict action *in rem* now existing under

(a) See Williams & Bruce, *Treatise on the Jurisdiction, &c. of English Courts in Admiralty Actions* (3rd ed.), Intro., and Part I., *Jurisdiction in Admiralty*, chaps. i. to ix., pp. 1—221; the 4th ed., by E. S. Roscoe, is practically a new work, but shows no material divergence as regards the topics discussed in this chapter. It is not the object of Rule 61 to give detailed information on admiralty jurisdiction, or concerning the kind of actions which may be considered admiralty causes or actions. The object of the Rule is simply to state the extension of the Court's admiralty jurisdiction *in rem*. For further details, the reader is referred to the Admiralty Practice, by Williams & Bruce, and also to the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65); the Admiralty Court Act, 1861 (24 Vict. c. 10); the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57); and the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81). See further, App., Note 11, "List of Admiralty Claims." See also, as to principle governing jurisdiction of Court as regards judgments *in rem*, General Principle No. III., Intro., p. 40, *ante*.

(b) See Williams & Bruce, p. 249, and Part II., chap. i.; but as to ship on her voyage, see *Borjesson v. Carlberg* (1878), 3 App. Cas. 1316.

(c) For meaning of "England," see pp. 68, 72, *ante*.

(d) See *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 427, 428, 429, opinion of Blackburn, J. The C. L. P. Act, 1852, abolished real actions which were actions *in rem*. Whether the action of ejectment may not be considered in effect an action *in rem* appears an open question.

English law is the action which used to belong exclusively to the Court of Admiralty, and now is properly brought in the Admiralty Division of the High Court against a ship or other *res*, such as cargo or freight, connected with a ship. Its object is to satisfy the claim of the plaintiff against the *res* by the transfer, sale, or other mode of dealing with the *res*. The foundation of this action *in rem* is the arrest of the ship, or other *res*, and this arrest cannot take place unless the ship, or other *res*, is lying at anchor either in England or in "English waters," which means within three miles of the coast of England (*e*).

The conditions, therefore, under which the Court has jurisdiction to entertain an action *in rem* are two:—

First. The action must be an "admiralty action."

An admiralty action (which used to be called a cause) may be described in general terms as an action which, immediately before the coming into force of the Judicature Act, 1873, could be brought in the Court of Admiralty, or, in other words, was based on a cause of action or claim which was within the jurisdiction of the Court of Admiralty. The jurisdiction of the Court of Admiralty in civil matters depended at that date partly on its original jurisdiction, but mainly on statutory enactments, and especially on the Admiralty Court Act, 1840 (3 & 4 Vict. c. 65), and the Admiralty Court Act, 1861 (24 Vict. c. 10). An admiralty action or cause always had reference to shipping, or to contracts or transactions more or less closely connected with shipping. Every claim, in short, which the Court of Admiralty had jurisdiction to entertain, had to a certain extent a maritime character. Examples of such claims are claims depending on questions arising between the co-owners touching the ownership, possession, employment and earnings of any ship registered at any port

(*e*) Williams & Bruce (3rd ed.), p. 261. "The warrant [for the arrest] may "be served anywhere within the jurisdiction, that is, in England or Wales, or "within three miles of the coast." *Ibid.*; and see the Merchant Shipping Act, 1894, s. 688. Contrast Roscoe, p. 292. See *Borjesson v. Carlberg* (1878), 3 App. Cas. 1316. Compare *The Nautik*, [1895] P. 121. Of course a ship might be arrested when in a Scottish, or Manx, or Jersey port, &c. But such arrest would be beyond the territorial limits of the High Court's jurisdiction, and would not give that Court the right to entertain an action against the ship. A writ in an action *in rem* can be issued at a time when the ship is not liable to arrest, but the jurisdiction becomes effective only on the serving of the warrant. *The Espanoleto*, [1920] P. 223. As to the relation of writ and warrant, see also *The Nautik*, [1895] P. 124; *The Broadmayne*, [1916] P. (C. A.) 64, 68, 69, 74, 76.

in England (*f*); claims to enforce bottomry bonds (*g*); claims for damage done or received by any British or foreign ship (*h*); claims for salvage, and the like. To give a definition covering all, and no more than all, the claims in respect of which the Court of Admiralty had jurisdiction is, it is conceived, hardly possible, and, for the purpose of this work at any rate, unnecessary. They must, in any case, be arrived at by a process of enumeration rather than of definition. All that need here be insisted upon is, that an admiralty action is an action in respect of a claim or matter over which the Court of Admiralty had jurisdiction until that jurisdiction was transferred by the Judicature Act, 1873, to the High Court, that such a claim was always of a more or less maritime character (*i*), and that the extension of the jurisdiction of the Court by later legislation has not altered its fundamental character.

Secondly. The ship or other *res* must be in England, or in English waters.

It should, however, further be remarked that the admiralty jurisdiction of the High Court may be exercised either by proceedings *in rem* or by proceedings *in personam*; the plaintiff, that is to say, may in most instances, at his option, bring an action either (*k*) *in rem*, against the ship or other *res*, or *in personam* against the owner of or other person interested in the ship or *res*, or both *in rem* against the ship and *in personam* against the owner or such other person (*l*).

(*f*) See Williams & Bruce, pp. 27—36; Roscoe, pp. 45—61; and Admiralty Court Act, 1861 (24 Vict. c. 10), s. 8.

(*g*) Williams & Bruce, pp. 47—72; Roscoe, pp. 69—79.

(*h*) *Ibid.*, pp. 71—113; Roscoe, pp. 80—135; 3 & 4 Vict. c. 65, s. 6; 24 Vict. c. 10, s. 7. Conf. M. S. Act, 1894 (57 & 58 Vict. c. 60), s. 688; 1 & 2 Geo. 5, c. 57.

(*i*) See for an enumeration of, at any rate, the principal claims in respect of which proceedings could be maintained in the Court of Admiralty, App., Note 11, "List of Admiralty Claims." It may be well to note that the question whether an admiralty action lies, and therefore whether the Court has jurisdiction to give judgment *in rem*, may often depend on the precise terms of some provision in the Admiralty Court Act, 1840; the Admiralty Court Act, 1861; the Maritime Conventions Act, 1911; or the Administration of Justice Act, 1920.

(*k*) See Admiralty Court Act, 1861, s. 35; Maritime Conventions Act, 1911, s. 5; Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), s. 5, sub-s. (2); and Williams & Bruce, pp. 249, 321; Roscoe, pp. 291—293.

(*l*) *Action in rem*,—*judgment in rem*,—*maritime lien*. These three things, which are sometimes confused together, should be carefully distinguished.

1. An action *in rem* is a proceeding to determine the right to, or disposition of, a thing under the control of a Court. The only proceeding *in rem* now

The Court has no jurisdiction to entertain an action against a ship or other *res* unless both the conditions of Rule 47 are fulfilled, *i.e.*, unless the action is an admiralty action and the ship or *res* is in England or in English waters.

Illustrations (*m*).

1. A co-ownership action is brought by *A* against a ship registered at the port of Liverpool. The Court has jurisdiction (*n*).

2. *A* is the indorsee of a bottomry bond granted in Portugal by the master of an Italian ship, The *Gaetano*, on the ship, and her cargo on board. *A* brings an action *in rem* against The *Gaetano*. The Court has jurisdiction (*o*).

3. A British ship, The *Clara Killam*, casts anchor near the South Foreland. Her anchor gets foul of a submarine telegraph cable. Under the master's direction, the cable is cut in order to free the anchor. The owners of the cable bring an action against

existing under English law is, as already pointed out, an action *in rem* in the Admiralty Division.

2. A judgment *in rem* is a judgment whereby a Court adjudicates upon the title to, or the right to the possession of, property within the control of the Court. *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428; Story, s. 492.

An action *in rem* does not of necessity lead to a judgment *in rem*. *A* brings an action against a ship for wages due to him as a sailor. *X*, the shipowner, appears and pleads to the action. The action may end, not in a judgment *in rem* against the ship, but in a judgment *in personam* against *X*, condemning him to pay, *e.g.*, 100*l.* and costs to *A*. See *The Gemma*, [1899] P. (C. A.) 285; *The Duplex*, [1912] P. 8.

3. A maritime lien is the right which a person has to the satisfaction of a given claim against a ship in whosoever hands the ship may be. Such a lien binds the ship, not only when in the hands of the owner on whose behalf a debt or other obligation has been contracted, but also when in the hands of any person whomsoever. A maritime lien can be enforced only by proceedings in an admiralty action *in rem*. One instance of a maritime lien is this: if *A* obtains a judgment *in rem* against a ship in a foreign country, *e.g.*, France, he can, on the ship reaching an English port, bring an action against the ship for the amount of the judgment, whoever be the person who is then owner of the ship. (*The City of Mecca* (1881), 6 P. D. (C. A.) 106, and Rule 119, *post*. See, as to maritime lien, *Northcote v. Owners of Henrik Björn* (1886), 11 App. Cas. 270, especially 276, judgment of Lord Watson, and compare *The Bold Buccleugh* (1851), 7 Moore, P. C. 267; *The Tergeste*, [1903] P. 26.) With a maritime lien the Rules in this chapter have no concern.

(*m*) In all the illustrations of this Rule it is assumed, unless otherwise stated, that the ship is in an English port or in English waters.

(*n*) See 24 Vict. c. 10, s. 8; Williams & Bruce, p. 33.

(*o*) *The Gaetano* (1881), 7 P. D. 1, (C. A.) 137.

The *Clara Killam* in respect of the injury to the cable. The Court has jurisdiction (*p*).

4. *A* and *B* save the lives of the passengers and crew of a British ship off the coast of France. *A* and *B* bring an action of salvage against the ship, claiming more than 300*l*. The Court has jurisdiction (*q*).

5. *A* brings an action against a British ship for loss of life of *H*, the husband, and *N*, the son of *A*, in consequence of the negligence of the master and crew of the British ship. The action is brought under Lord Campbell's Act, 9 & 10 Vict. c. 93. The Court has jurisdiction to entertain the action (*r*).

6. *A* and *B* save the lives of the passengers of a British ship off the coast of France. The ship is in Port Douglas, in the Isle of Man. *A* and *B* have a claim for 500*l*. salvage. The Court has no jurisdiction to entertain an action by *A* and *B* for salvage against the ship (*s*).

(*p*) *The Clara Killam* (1870), L. R. 3 A. & E. 161; Admiralty Court Act, 1861 (24 Vict. c. 10), s. 7. Compare *The Griefswald* (1859), Swabey, 430.

(*q*) 24 Vict. c. 10, s. 9; M. S. Act, 1894 (57 & 58 Vict. c. 60), ss. 544, 547.

(*r*) See the Maritime Conventions Act, 1911, ss. 2 and 5. Contrast *The Vera Cruz* (1884), 10 App. Cas. 59, which was decided under the law as existing prior to that Act. As to the limitation of time within which such an action can be brought, see sect. 8 of the Act, and *The Caliph*, [1912] P. 213; *The Espanoleto*, [1920] P. 223.

(*s*) The ship is not in England or in English waters. See Williams & Bruce, p. 261.

CHAPTER VII.

JURISDICTION IN RESPECT OF DIVORCE—
DECLARATION OF NULLITY OF MARRIAGE—
AND DECLARATION OF LEGITIMACY.I. DIVORCE (*a*).

(A) WHERE COURT HAS JURISDICTION.

RULE 62.—The Court has jurisdiction to entertain proceedings for the dissolution of the marriage of any parties domiciled in England at the commencement of the proceedings (*b*).

This jurisdiction is not affected by—

- (1) the residence of the parties (*c*), or
- (2) the allegiance of the parties (*d*), or
- (3) the domicile of the parties at the time of the marriage (*e*), or
- (4) the place of the marriage (*f*), or
- (5) the place where the offence, in respect of which divorce is sought, is committed (*g*).

(*a*) Westlake (5th ed.), ss. 43—52; Foote (4th ed.), pp. 109—124; Story, ss. 200—230 b; Wharton, ss. 204—239 a. See, as to jurisdiction in divorce and its connection with domicile, Sub-Rule to General Principle No. III., Intro., p. 43, *ante*; App., Note 12, "Theories of Divorce."

(*b*) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435; *Gould v. Gould*, [1892] P. 240; 61 L. J. P. & D. 117; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

(*c*) See *Gould v. Gould*, [1892] P. 240; 61 L. J. P. & D. 117; *Dolphin v. Robins* (1859), 7 H. L. O. 390.

(*d*) *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1.

(*e*) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435. Compare *Harvey v. Farnie* (1882), 8 App. Cas. 43, and *Turner v. Thompson* (1888), 13 P. D. 37.

(*f*) *Ibid.*, and *Ratcliff v. Ratcliff* (1859), 1 Sw. & Tr. 467.

(*g*) *Ibid.* Since the "citation," which corresponds with the writ in an action, may be served out of England, the jurisdiction of the Court is not affected by the absence of the respondent from England during the proceedings for divorce. See *e.g.*, *Turner v. Turner* (1916), 86 L. J. P. 13; [1916] P. 324. As to the mode of proving an offence abroad, see *Gayer v. Gayer*, [1917] P. (C. A.) 99.

In this Digest the term "marriage" means the voluntary union for life of one man and one woman to the exclusion of all others (*h*).

Comment and Illustrations.

The principle now in the main adopted by English Courts (*i*) is, that jurisdiction in matters of divorce depends upon domicile, or, in other words, that the question whether parties to a marriage ought to be divorced is one which concerns the authorities of the country where they live and have their legal home, and that, therefore, the Courts of the country where the parties are so living, *i.e.*, are domiciled, at the time of the demand for a divorce, are the Courts to which in general ought to be referred the question whether the marriage between the parties should or should not be dissolved.

"It is," says a high judicial authority, "the strong inclination of my own opinion that the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude

(*h*) For this definition of the term "marriage," see *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130; *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

(*i*) They at one time inclined towards the quite different principle that the right to divorce depended upon the terms of the marriage contract, and, therefore, upon the law under which the marriage was celebrated, and hence held that the jurisdiction in matters of divorce belonged exclusively to the Courts of the country under the law of which the marriage took place, which was in the great majority of instances (if not always) the country where the marriage was celebrated. See *Tovey v. Lindsay* (1813), 1 Dow. 117; *Lolley's Case* (1812), 2 Cl. & F. 567; *McCarthy v. De Caix* (1812), 2 Cl. & F. 568; App., Note 12, "Theories of Divorce," and App., Note 16, "Effect of Foreign Divorce on English Marriage." *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1 (now in effect overruled by *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; see *Sinclair's Divorce Bill*, [1897] A. C. 469; *Malone's Divorce (Valid Action) Bill*, [1905] A. C. 314) made it hard to determine the principle adopted by the High Court.

“the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another” (*k*).

“It seems,” says Lord Justice Brett, “that the only Court which, on principle, ought to entertain the question of altering the relation in any respect between parties admitted to be married or the status of either of such parties arising from their being married, on account of some act which by law is treated as a matrimonial offence, is a Court of the country in which they are domiciled at the time of the institution of the suit. If this be a correct proposition, it follows that the Court must be a Court of the country in which the husband is at the time domiciled, because it is incontestable that the domicile of the wife, so long as she is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is *ex hypothesi*—still a wife” (*l*).

Hence the Court has jurisdiction to grant a divorce in any case, without exception, where the domicile of the parties (*i.e.*, in effect of the husband) is English at the commencement of the proceedings for divorce.

H and *W* are married in India. Adultery is committed by *W* in India. *H*, being domiciled in England, institutes a suit for divorce against *W*. The Court has jurisdiction to grant a divorce (*m*).

H and *W* are a Scottish husband and wife domiciled in Scotland, who have married in Scotland. *W*, during the continuance of the Scottish domicile, commits adultery in Scotland. *H* afterwards acquires an English domicile, and then applies to the English Court for a divorce. At the time of the application, and throughout the proceedings, *W*, the wife, is in fact resident in Scotland. In prior proceedings before the Scottish Courts by *W* against *H*, these Courts held that *H* was domiciled in Scotland. *H* has, as a matter of fact, in the judgment of the High Court, acquired an English domicile. The Court has jurisdiction to pronounce a divorce between *H* and *W* (*n*).

(*k*) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, 442, judgment of Lord Penzance. This statement of the law is in conformity with the expressions of Lord Westbury in *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 85.

(*l*) *Niboyet v. Niboyet* (1878), 4 P. D. 1, 13, 14, judgment of Brett, L. J.; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

(*m*) *Ratcliff v. Ratcliff* (1859), 1 Sw. & Tr. 467.

(*n*) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435. If it be borne in mind that Scotland and Ireland are, as regards divorce, to be considered foreign countries (*Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574, 585), it will be seen

Of the various other circumstances which might be thought material, none are, it is conceived, of importance as *limiting* (o) the jurisdiction of the Court.

As to residence.—Residence, as contrasted with domicile (p), is certainly unimportant. *H* and *W* are domiciled in England, but reside in France. *W* commits adultery in Paris. *H*, though residing abroad, can obtain a divorce from the Court (q).

As to allegiance.—This is the tie by which a person is connected with a State (r) as being a subject of the sovereign of such State; and it might be thought that as a person's connection with a particular political society depends upon his allegiance, or in more popular language, his nationality, jurisdiction to declare whether a given person is to be considered married or unmarried would belong to the Courts of the State or nation of which he is a member or citizen. This, however, is not the view of English tribunals. In perfect consistency with the view that civil, as contrasted with political, status depends upon domicile, they hold that the jurisdiction of an English Court to grant a divorce is not affected by the allegiance of the parties. *H* and *W* are French subjects domiciled at Manchester, where *W* commits adultery. The Court has jurisdiction to grant a divorce (s).

As to domicile, &c.—That the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the offence, in respect of which divorce is sought, was committed, has no effect in limiting the jurisdiction of the Court is certain (t).

Whatever be, at the time of a marriage, the domicile of the parties thereto, or the country where the marriage is celebrated, the Court

that the decision in *Wilson v. Wilson* supports to the full the doctrine that the Court has jurisdiction over all persons domiciled in England.

(o) Some of them may be of importance as giving jurisdiction.

(p) See *Dolphin v. Robins* (1859), 7 H. L. C. 390, 406, for expressions of Lord Chelmsford contrasting residence and domicile, and p. 84, note (e), *ante*.

(q) See *Goulden v. Goulden*, [1892] P. 240; 61 L. J. P. & D. 117; *Gillis v. Gillis* (1874), 8 Ir. R. Eq. 597.

(r) For difference between "State" and "country," see pp. 67, 69—71, *ante*.

(s) *Niboyet v. Niboyet* (1878), 4 P. D. 1. In this case no objection seems to have been made to the divorce on the ground of the husband being a French citizen, and the mere fact of a foreign allegiance does not appear in any reported case to have been treated by the Court as a ground for declining jurisdiction; even an alien enemy when interned may petition for divorce. See *Uhlig v. Uhlig* (1916), 33 T. L. R. 63; 86 L. J. P. 90; *Krauss v. Krauss* (1919), 35 T. L. R. 637.

(t) *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, is sufficient, without other authorities, to establish this. See *Ratcliff v. Ratcliff* (1859), 1 Sw. & Tr. 467.

has no jurisdiction to entertain proceedings for a dissolution of the marriage for any offence which is not a ground for divorce under the law of England (*u*).

H and *W*, a Scotsman and Scotswoman, are, when domiciled in Scotland, married at Edinburgh. They afterwards acquire an English domicile. *H* obstinately deserts *W* for more than four years. Under the law of Scotland, such desertion is a cause for divorce. The Court has no jurisdiction to entertain proceedings by *W* for a dissolution of the marriage, desertion not being in itself a ground for divorce under the law of England.

Proviso.—Meaning of term “marriage.”—By the term “marriage” is meant in these Rules marriage as understood in Christendom, *i.e.*, “the voluntary union for life of one man and “one woman to the exclusion of all others” (*x*). Hence Rule 62 has no application to connections which, though called marriages, either are not intended to be for life, or are made with a view to polygamy. To what extent the law of England will recognise rights, *e.g.*, of inheritance, depending upon the institution of polygamy, is doubtful; but it is clear that the Rule in question does not apply to polygamous marriages (*y*). It has been laid down that “it would be extraordinary if a marriage in its essence “polygamous should be treated as a good marriage in this country. “Different incidents of minor importance attach to the contract “of marriage in different countries in Christendom, but in all “countries in Christendom the parties to that contract agree to “cohabit with each other alone. It is inconsistent with marriage,

(*u*) For meaning of “law of England,” see p. 79, *ante*.

(*x*) See *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 133, per Lord Penzance; *Brinkley v. Attorney-General* (1890), 15 P. D. 76, 78, 79, 80, judgment of Sir J. Hannen; *R. v. Superintendent Registrar of Marriages for Hammersmith, Ex parte Mir-Anwaruddin*, [1917] 1 K. B. (C. A.) 634; *R. v. Naguib*, [1917] 1 K. B. 359. See also App., Note 15, “Cases of *Chetti v. Chetti* and *Ex parte Mir-Anwaruddin*.” A marriage, though made between persons who are not Christians, *e.g.*, Japanese, is a valid marriage according to English law if, under Japanese law, one man unites himself to one woman for life to the exclusion of all others. But a union formed between a man and a woman in a foreign country is not a valid marriage, according to English law, unless it be the voluntary union for life of one man and one woman to the exclusion of all others. *In re Bethell* (1888), 38 Ch. D. 220. But conf. *Grenal v. Grenal* (Sikh Marriage Case) (1907), *The Times*, Aug. 1.

(*y*) This is in reality only one instance of the principle that the rules of (so-called) private international law apply only amongst civilized States. These rules assume a certain similarity among the laws and institutions existing in the States where they are to be applied. See Intro., pp. 30, 31, *ante*.

“as understood in Christendom, that the husband should have more than one wife” (z). And, on the principle that “the law of this country is adapted to the Christian marriage, and . . . is wholly inapplicable to polygamy” (a), the Divorce Court has refused even to dissolve a marriage made in Utah, according to Mormon rites, with the intention to contract a Mormon marriage (b).

The Court, nevertheless, did “not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves.” All that was decided is, that, “as between each other, they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England” (c).

SUB-RULE.—On a petition for divorce presented by a husband domiciled in England, the Court has jurisdiction to award costs, and (if claimed by the husband) damages, against a co-respondent named in the petition, whatever his place of residence or nationality.

Comment.

This exercise of jurisdiction on the part of the Court is provided for by the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), which requires (sects. 27, 28) any husband who presents a petition for divorce on the ground of the adultery of his wife to make the alleged adulterer a co-respondent to the petition unless on special grounds he is excused by the Court from doing so, and provides (sect. 33) that, if a husband claims damages against the alleged adulterer, the petition must be served on him, unless the Court should dispense with such service. Sect. 42 of the Act provides that every petition shall be served on the party affected

(z) *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 132, per Lord Penzance.

(a) *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 135. See *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 531, for language of Lord Brougham; *Ardaseer Cursetjee v. Perozeboyee* (1856), 10 Moore, P. C. 375, 418.

(b) *Ibid.*

(c) *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130, 138, per Lord Penzance. Compare, however, *In re Ullee* (1886), 54 L. T. (C. A.) 286, where the Court had to consider an application by the mother of children, born of a polygamous marriage with a Mahomedan in England, for their custody.

thereby, either within or without the British dominions, in such manner as the Court shall direct. Despite the precise terms of the enactment for some time a practice prevailed under which foreign co-respondents if resident abroad were held entitled to apply to be dismissed from divorce suits on the ground that they were not subject to the jurisdiction of the Court by allegiance or residence in England. It has now been definitely decided that, though the Court has a discretionary power to dispense with service of the petition on a foreign co-respondent residing out of England, it has jurisdiction over such a co-respondent, although, of course, it may be impossible to enforce against him any order made by the Court (*d*).

Illustration.

H, domiciled in England, petitions for divorce from *W*, alleging adultery at Lisbon with *A*, a citizen of the United States, and *B*, a Portuguese subject. He applies for leave to dispense with the service of the petition on *A* and *B*, on the ground that they are foreigners resident out of England and not within the jurisdiction of the Court. *Held*, that the Court has jurisdiction over both co-respondents and that there is no ground in the circumstances to dispense with service in either case (*e*).

(B) WHERE COURT HAS NO JURISDICTION.

RULE 63.—Subject to the possible exception herein-after mentioned (*f*), the Court has no jurisdiction to entertain proceedings for the dissolution of the marriage of any parties not domiciled in England at the commencement of the proceedings (*g*).

(*d*) *Rayment v. Rayment*, [1910] P. 271, per Evans, Pres.; *Rush v. Rush and Bailey and Pimenta*, [1920] P. (C. A.) 242; *Wardell v. Wardell and Teague*, *The Times*, July 11, 1921.

(*e*) *Rush v. Rush and Bailey and Pimenta*, [1920] P. 242. The case also decides that in an application of this character by a petitioner the respondent has a *locus standi* to oppose the motion; contrast *Dobson v. Dobson and Paxton*, [1916] P. 110.

(*f*) Contrast *Nichols v. Nichols* (1912), *The Times*, Nov. 13; *De Montaigu v. De Montaigu*, [1913] P. 154.

(*g*) *Cusdagli v. Cusdagli*, [1919] A. C. 145. A British subject may have a domicile in Egypt which precludes the possibility of divorce proceedings against him in England.

Comment.

This Rule is certainly in conformity with the general run of the authorities.

There is, it is submitted (subject always to the possible exception hereinafter mentioned), no valid ground for maintaining that residence not amounting to domicile gives the Court jurisdiction. In a case where all the authorities were considered the law has thus been laid down by the Privy Council:—

“ Their Lordships have in these circumstances, and upon these considerations, come to the conclusion that, according to international law, the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage. They concur, without reservation, in the views expressed by Lord Penzance (*h*) in *Wilson v. Wilson* (*i*), which were obviously meant to refer, not to questions arising in regard to the mutual rights of married persons, but to jurisdiction in the matter of divorce” (*k*).

Their Lordships no doubt used these words in a case which had reference to the divorce jurisdiction of a foreign Court, but they obviously intended their language to be of general application. They pointedly dissented from *Niboyet v. Niboyet* (*l*), in which the majority of the Court of Appeal held that residence short of domicile might give the Divorce Court jurisdiction. Nor can it seriously be doubted that the principle maintained by the Privy Council would now be followed by the House of Lords, and that English Courts do not recognize the existence of a matrimonial home or a matrimonial domicile, *i.e.*, of residence falling short of real domicile, as the foundation of divorce jurisdiction.

The respect due to this Rule is shown by the following decision:—

H petitioned for a divorce from his wife, *W*, on account of adultery. *H* alleged in his petition that he was domiciled in England. There was no defence on *W*'s behalf. A decree *nisi* was pronounced. It afterwards turned out that *H* was mistaken in his belief that he was domiciled in England. No question as to domicile had been raised on the pleadings. The petition was there-

(*h*) Cited pp. 286, 287, *ante*.

(*i*) (1872), L. R. 2 P. & D. 435, 442.

(*k*) *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 540, per Lord Watson.

(*l*) (1878), 4 P. D. (O. A.) 1.

upon dismissed and the decree *nisi* was rescinded with costs against *H* (*m*).

Students must further remember that the domicile of a wife is under English law during coverture, the same as the domicile of her husband (*n*). Our Rule, therefore, means that, speaking generally, the Court has no jurisdiction to grant a divorce at the suit of a wife unless the husband at the moment when the proceedings are taken is domiciled in England.

Illustrations.

1. *H* and *W*, his wife, are domiciled in Ireland. *W*, who is resident in England, institutes proceedings for divorce against *H*, who appears under protest. The Court has no jurisdiction to grant a divorce (*o*).

2. *H*, a French citizen, marries *W*, an Englishwoman, at Gibraltar. *H* and *W* have resided for some years in England, but *H* resides there as French Consul, and admittedly retains his French domicile of origin, not having acquired an English domicile. *W* presents a petition for divorce on the ground of adultery committed in England and desertion. *H* appears under protest and objects to the jurisdiction. The Court has no jurisdiction to grant divorce (*p*).

3. *H*, a Mexican, domiciled in Mexico, marries in London *W*, an Englishwoman, domiciled at the time of her marriage in England. By Mexican law a marriage is not valid in Mexico, unless it has been there duly registered by one or other of the parties to the marriage. The marriage of *H* and *W* has not been registered in Mexico. No decree of divorce can be obtained under the law of Mexico, but *W*, by registering the marriage in Mexico, could

(*m*) *Barlow v. Barlow* (1911), *The Times*, July 7, 1911.

(*n*) See Rule 9, Sub-Rule 2, p. 134, *ante*.

(*o*) See *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

(*p*) *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1. This was the judgment of the Court of Probate, which was overruled by the majority of the Court of Appeal, *dissentiente* Brett, L. J.; but *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, has in effect, though not technically, overruled the judgment of the Court of Appeal in *Niboyet v. Niboyet*, and supports the principle laid down by the Probate Division in that case; *Rayment v. Rayment*, [1910] P. 271, 280; *Waddington v. Waddington* (1920), 36 T. L. R. 359; in *Sinclair's Divorce Bill*, [1897] A. C. 469, the invalidity of an English divorce granted without proof of domicile was recognized as obvious by the House of Lords on the strength of *Le Mesurier v. Le Mesurier*, and a valid divorce granted by Act of Parliament. See also *Malone's Divorce (Valid Action) Bill*, [1905] A. C. 314; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146.

have obtained a judicial separation. *W* petitions for divorce in England on the ground of *H*'s adultery, cruelty, and desertion. The Court has no jurisdiction (*q*).

Exception.—Where—

- (1) a foreigner marries in England a woman then domiciled in England, and such marriage is legally valid according to the law of England (*r*), and such foreigner is either at the time of the marriage domiciled in a foreign country or after the time of the marriage acquires a domicile in a foreign country, and
 - (2) such English marriage is, in such foreign country, declared to be invalid by the Courts thereof,
- the High Court probably has jurisdiction to entertain a petition for divorce on the part of the wife (*s*).

Comment.

For a full discussion of the nature and the validity of this Exception, see the Appendix, Notes 13 and 14. The Exception

(*q*) *Ramos v. Ramos* (1911), 27 T. L. R. 515. This is a strict application of our Rule. *W* by her marriage with *H* obtains a Mexican domicile, as that term is understood in England. This fact is not affected by the consideration that under Mexican law *W* does not become the wife of *H* till the registration of her marriage. Hence it follows that *W*, when petitioning for a divorce in England, is domiciled in Mexico, and that the Court has no jurisdiction to grant a divorce.

(*r*) Such a marriage, *i.e.*, a marriage celebrated in England and legally valid according to the law of England, may hereinafter be called an English marriage.

(*s*) *Stathatos v. Stathatos*, [1913] P. 46; *De Montaignu v. De Montaignu*, [1913] P. 154. See also *Ogden v. Ogden*, [1908] P. (C. A.) 46, 82, 83, which contains important dicta in favour of some change in the law, but is not a judgment in support of this Exception, and Illustrations, p. 295, *post*.

As to the question whether the High Court may not have jurisdiction in some cases to grant a decree of nullity in respect of a marriage duly celebrated in England, on the petition of a wife whose husband is not domiciled in England, see Appendix, Note 13, *post*, and additional illustrations based on *Sottomayor v. De Barros* (No. 1) (1877), 3 P. D. (C. A.) 1.

For a further possible exception to Rule 63, see App., Note 14, "Extension of Divorce and Nullity Jurisdiction—The Matrimonial Causes Bill, 1921."

represents an attempt of the Divorce Court to meet cases of injustice arising from a conflict of views between English and foreign Courts as to the validity of marriages contracted in England between women domiciled there and men of foreign nationality and domicile. Through this divergence of view a marriage, which is contracted and binding in England, may be declared null and void, *e.g.*, in France, and in order to save women from the hardship of being married in the view of English law, whilst held unmarried in the view of the foreign law, an anomalous and restricted jurisdiction to grant divorce, on the petition of the wife, has been assumed by the Divorce Court.

Illustrations.

1. *H* is a Greek subject domiciled in Greece. *H* marries *W* in England. The marriage is in every respect valid by the law of England. *H* and *W* go to Greece. *H* sends *W* back to England. Whilst *W* is in England, *H* obtains from the Greek Courts a declaration of nullity in respect of the marriage in England. It is obtained on the ground that the absence of any Greek priest at the marriage made it under Greek law a nullity. *H* then marries in Greece another woman. *W* petitions in the English Probate Division for a divorce. *H* does not appear. The Court has jurisdiction (*t*).

2. *H* is a French citizen domiciled in France. *W* is an Englishwoman domiciled in England. *H* met and knew *W* in Paris, and requested her to marry him there. *W* declined to do so. *H* and *W* then came to England and were there married. The marriage was entirely valid according to the law of England. *H* and *W* live together in France for some time. Proceedings were before long taken by *H*'s father to have the marriage declared invalid in France. Both *H* and *W* entered an appearance in these proceedings, but took no further part. The French Court declared the English marriage to be null and void on the ground that *H* and *W* had not complied with the provisions of the Code Civil, Arts. 63, 151 and 171, and that the marriage was clandestine. *W* takes proceedings in the Divorce Court to obtain a divorce. The Court has jurisdiction (*u*).

(*t*) And grants a divorce. *Stathatos v. Stathatos*, [1913] P. 46.

(*u*) And grants a divorce. *De Montaignu v. De Montaignu*, [1913] P. 154.

II. JUDICIAL SEPARATION AND RESTITUTION OF CONJUGAL RIGHTS.

RULE 64.—The Court has jurisdiction to entertain a suit for the restitution of conjugal rights or (*semble*) for judicial separation when both the parties thereto

- (1) were domiciled in England at the time of the institution of the suit; or
- (2) had a matrimonial home in England when their cohabitation ceased, or the events occurred on which a claim for separation is based; or
- (3) were both resident in England at the time of the institution of the suit (*x*).

Comment.

The jurisdiction of the Court in matters matrimonial, other than proceedings to obtain a divorce *a vinculo* is determined in accordance with the principles and rules on which the Ecclesiastical Courts acted prior to 1858 (*y*), whence it follows that jurisdiction to entertain a suit for judicial separation (the equivalent of divorce *a mensâ et thoro*) or for the restitution of conjugal rights (*z*) depends primarily upon the more or less permanent

(*x*) See Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), ss. 7, 22; Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68); *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 4—7, judgment of James, L. J., which, except as regards divorce *a vinculo*, is clearly good law; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 531; *Armstrong v. Armstrong*, [1898] P. 178, 186; *Perrin v. Perrin*, [1914] P. 135; *Anghinelli v. Anghinelli*, [1918] P. (C. A.) 247; *Riera v. Riera* (1914), 112 L. T. 223; *Lang v. Lang* (1915), 31 T. L. R. 467; *Brown v. Brown* (1917), 116 L. T. 702.

(*y*) “In all suits and proceedings, other than proceedings to dissolve any marriage [*i.e.*, to obtain divorce *a vinculo*], the . . . Court shall proceed and “act and give relief on principles and rules which in the opinion of the said “Court shall be as nearly as may be conformable to the principles and rules “on which the Ecclesiastical Courts have heretofore acted and given relief, “but subject to the provisions herein contained and to the Rules and Orders “under this Act.” Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 22.

(*z*) See, however, Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), and also compare *Russell v. Russell*, [1895] P. (C. A.) 315, 333—335, per Lopes, L. J.; *Dicks v. Dicks*, [1899] P. 275. As the result of the enactment was to make a decree of restitution of conjugal rights a normal prelude to divorce proceedings, it became obviously difficult to refuse to entertain a suit for restitution where the parties were domiciled in England; and jurisdiction in divorce therefore existed.

residence of the parties, and not upon their being domiciled in England. "Can there be any doubt," asked James, L. J., "that before the English Act of Parliament transferring the jurisdiction in matrimonial causes from the Church and her Courts to the Sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce *a mensâ et thoro*, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of their baptism, became members of the one Catholic and Apostolic Church. The Church and its jurisdiction had nothing to do with the original nationality or acquired domicils of the parties, using the word domicile in the sense of the secular domicile, viz., the domicile affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or *in itinere*, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve, what has been found so often very difficult of solution, the question of a person's domicile" (a).

"There are unquestionably other remedies for matrimonial misconduct, short of dissolution, which, according to the rules of the *jus gentium*, may be administered by the Courts of the country in which spouses, domiciled elsewhere, are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicile of the parties" (b).

"It may, I think," said Sir J. Gorell Barnes, "be safely laid down that the Ecclesiastical Courts would formerly, and this Court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction [in England], when the necessities of the case require such intervention. I

(a) *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 4, 5, per James, L. J.

(b) *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 526, 527, per Lord Watson.
Conf. Armytage v. Armytage, [1898] P. 178, 188, 189.

"therefore hold that this Court has jurisdiction to entertain this "suit," *i.e.*, a suit for judicial separation (*c*).

While, as shown by these passages, domicile is not, as in the case of divorce, the only basis of jurisdiction, the Court has never, at any rate since the Matrimonial Causes Act, 1884, was passed, declined to exercise jurisdiction on the ground that, though the parties to the marriage were domiciled in England, they were not both resident in England at the time when a suit for the restitution of conjugal rights or judicial separation was commenced. The grounds on which jurisdiction in suits for the restitution of conjugal rights will be exercised have been recently authoritatively laid down as enumerated in the Rule (*d*). In instances in which one or other of these conditions is not fulfilled, the Court will not exercise jurisdiction (*e*). Contrary to the Rule in cases of application for a decree of nullity, the Court does not derive jurisdiction from the mere fact that a marriage has been celebrated in England, and it has no power to make a declaratory judgment as to the validity of any marriage save as incidental to jurisdiction under the Legitimacy Declaration Act, 1858 (*f*).

Though the jurisdiction of the Court may be exercised in every case where the parties to the suit were resident in England at the time of the institution of the proceedings, it must be remembered that the making of an order is a matter of discretion, and that an order might be refused in a proper case, *e.g.*, if the suit were brought on the strength of a mere temporary residence, and the parties were not domiciled in England.

The position regarding suits for judicial separation seems to be closely analogous to that of suits for restitution of conjugal rights, and it is submitted that the same principles should apply. The

(*c*) *Armytage v. Armytage*, [1898] P. 178, 197, judgment of Sir J. Gorell Barnes, J.

(*d*) See *Dicks v. Dicks*, [1899] P. 275; *Bateman v. Bateman*, [1901] P. 136; *Hardie v. Hardie* (1901), 70 L. J. P. & M. 29; *Cowley v. Cowley* (1913), 29 T. L. R. 690; *Perrin v. Perrin*, [1914] P. 135. In the last case the whole subject is reviewed, and an explanation given of Rules 221, 222 under the Matrimonial Causes Act, 1857, which were then made to define the jurisdiction to be exercised. The decision in that case and the Rules essentially modify the principle laid down in *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin*, [1914] P. 53, that service of a petition for restitution of conjugal rights out of the jurisdiction is not permissible.

(*e*) *Firebrace v. Firebrace* (1878), 4 P. D. 63, 68; *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin*, [1914] P. 53; *Perrin v. Perrin*, [1914] P. 135, 139.

(*f*) See Rule 66, pp. 305—311, *post*.

case of *Anghinelli v. Anghinelli* (*g*) decides definitely that domicile is not a necessary basis for the exercise of jurisdiction.

Illustrations.

1. A marriage is celebrated at Gibraltar, between *H*, a Frenchman domiciled in France, and *W*, an Englishwoman domiciled in England. They reside for several years in England, but *H*, as French Consul, retains his French domicile of origin. While they are in England, *W* brings a suit for judicial separation. The Court has jurisdiction (*h*).

2. *H* and *W* are domiciled in Australia. Owing to *H*'s cruelty while travelling in Italy, *W* seeks the protection of her parents in England and establishes a home for herself and her children there. *H* comes to England and demands her return to him with her children. She refuses, and, while *H* and *W* are residing in England, begins a suit for judicial separation. The Court has jurisdiction (*i*).

3. *H* and *W*, domiciled and married in France, set up their residence in England. *H* deserts *W*, who claims restitution of conjugal rights. The Court has jurisdiction.

4. *H* is domiciled in Australia, where he marries *W*. They come to England but do not acquire an English domicile. *H* returns to Australia. *W*, who remains in England, desires to sue for restitution of conjugal rights. The Court has no jurisdiction (*k*).

5. *H* and *W*, the latter domiciled in England at the time of her marriage, marry and are domiciled in Australia. *H* ill-treats *W*, who returns to her father's home. *W* desires to secure a judicial separation on the ground of *H*'s cruelty. The Court has no jurisdiction (*l*).

(*g*) [1918] P. (C. A.) 247. See *E. v. E.* (1907), 23 T. L. R. 364. Domicile and residence are recognized in *Christian v. Christian* (1897), 78 L. T. 86, 88; and see *Armstrong v. Armstrong*, [1898] P. 178. Compare *Millar v. Millar* (1883), 8 P. D. 187, apparently based on domicile. Residence of the petitioner only is insufficient: *Manning v. Manning* (1871), L. R. 2 P. & D. 223.

(*h*) The principle is recognised in *Niboyet v. Niboyet* (1878), 4 P. D. (O. A.) 1.

(*i*) *Armstrong v. Armstrong*, [1898] P. 178.

(*k*) See *Firebrace v. Firebrace* (1878), 4 P. D. 63, 68; *Yelverton v. Yelverton* (1859), 1 Sw. & Tr. 574.

(*l*) Contrast *Armstrong v. Armstrong*, [1898] P. 178, where the circumstances differ.

6. *H* and *W* have no connection with England save for the fact that they go through the ceremony of marriage there. *H* lives in and is domiciled in Germany; *W* lives in France. A competent Court in Germany pronounces a decree of nullity of marriage, which decree is valid in Germany. *W* comes to England for the sole purpose of obtaining from the Court either a decree for the restitution of conjugal rights or a declaration of the validity of her marriage in England. The Court has no jurisdiction to make either a decree for restitution or to declare the validity of the marriage (*m*).

7. *H* is born in France, but retains his English domicile of origin acquired from his father. He marries in France *W*, who is an Englishwoman, domiciled in England. On account of *H*'s cruelty *W* leaves him, and makes her home in England. *H*, who remains in France, commits adultery there. *W*, in order to secure ground for a divorce, brings a suit for restitution of conjugal rights. The Court has jurisdiction, and (*semble*) in such a case will exercise its discretion in favour of *W* (*n*).

8. The circumstances are as in the preceding illustration, but *H* has acquired a French domicile. The Court has no jurisdiction.

III. DECLARATION OF NULLITY OF MARRIAGE.

RULE 65 (*o*).—The Court has jurisdiction to entertain a suit for the declaration of the nullity of any existing marriage—

(1) where the marriage was celebrated in England; or

(*m*) *Countess de Gasquet James v. Duke of Mecklenburg-Schwerin*, [1914] P. 53. The validity of the decision in this case is not affected by *Perrin v. Perrin*, [1914] P. 135, though the principle that service of a petition for restitution of conjugal rights out of the jurisdiction is not permissible, which was asserted in the former case (compare *Firebrace v. Firebrace* (1878), 4 P. D. 63; *Chichester v. Chichester* (1885), 10 P. D. 186), is no longer tenable.

(*n*) In *Brown v. Brown* (1917), 116 L. T. 702, the marriage took place in Sierra Leone, where the husband, against whom the suit was brought, was resident. The ground for jurisdiction appears clearly to have been domicile. As to jurisdiction in Scotland, see *Maclaren*, Court of Session Practice, pp. 59, 60.

(*o*) The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6. A suit for declaration of nullity cannot be entertained after a decree of separation by reason of adultery (*Guest v. Shipley* (1820), 2 Hagg. Cons. 321), or after the death of one of the parties (*A. v. B.* (1868), L. R. 1 P. & D. 559), or after a decree of divorce. But see p. 308, *post*.

- (2) where the respondent is resident in England, not on a visit as a traveller and not having taken up that residence for the purpose of the suit; or
- (3) where the parties to the marriage are domiciled in England (?).

Comment.

The circumstances in which the Court has jurisdiction to entertain a suit for the declaration of the nullity of a marriage, and to pronounce it a nullity, have not been settled with precision, but there is authority of varying degrees of strength for the exercise of jurisdiction in the three cases above enumerated.

(1) The Court has unquestionably jurisdiction to pronounce on the validity of any marriage celebrated in England. The law was thus laid down in a case in which the Court was asked to pronounce a decree of nullity where both the parties were aliens, and neither of them was domiciled in England at the time when the suit was brought, but the marriage was celebrated in England:—

“The marriage contract was entered into here, and on that ground the Court was asked to deal with it. In *Simonin v. Mallac* (*p*) the parties to the marriage were domiciled French people; but the marriage was celebrated here and the judge held that he had jurisdiction to deal with the contract. In *Sottomayor v. De Barros* (*q*) the parties were Portuguese, and not resident or domiciled here, but the case was decided here. In *Niboyet v. Niboyet* (*r*) the Master of the Rolls (*s*) said that the principles of dissolution of marriage did not apply to nullity suits, and that in these suits the validity of the ceremony was to be determined according to the law of the place in which it was celebrated. The jurisdiction of this Court to deal with the question of the validity of the marriage of the parties to the present suit was therefore clear” (*t*).

Jurisdiction on this ground can clearly be justified not merely for the sake of correcting the civil register of the country, but also

(*p*) (1860), 2 Sw. & Tr. 67.

(*q*) (1877), 3 P. D. (C. A.) 1.

(*r*) (1878), 4 P. D. (C. A.) 1.

(*s*) Brett, L. J., at p. 19.

(*t*) *Linke v. Van Aerde* (1894), 10 T. L. R. 426, judgment of Gorell Barnes, J. See also *Cooper v. Crane*, [1891] P. 369; *Sproule v. Hopkins*, [1903] 2 Ir. R. 133; *Ogden v. Ogden*, [1908] P. (C. A.) 46.

because the Court of the country in which a marriage is celebrated is especially qualified to decide the validity of the marriage in point of form.

A marriage duly celebrated abroad under and in accordance with the Foreign Marriage Acts is to be considered, for the purpose of giving the Court jurisdiction, as a marriage celebrated in England (*u*).

(2) Where the respondent is resident in England, there are obvious grounds of convenience which may justify the exercise of jurisdiction by the Court. In such a case, however, it must be assumed that the residence is of a more or less permanent character as opposed to a mere visit for purposes of business or pleasure; possibly also the Court might decline to exercise jurisdiction on the ground of a residence which had been merely taken up in order to facilitate the obtaining of a decree of nullity from the Court (*x*).

(3) Jurisdiction in case of nullity of marriage, it has been argued (*y*), cannot depend on domicile. The argument seems to rest on an observation of James, L. J., in *Niboyet v. Niboyet* (*z*), where he said: "How would it be possible to make domicile the test of jurisdiction in such a case? Suppose the alleged wife were the complainant, her domicile would depend on the very matter in controversy. If she was really married, her domicile would be the domicile of her husband; if not married, then it would be her own previous domicile."

The weight of this dictum is in some measure diminished by the fact that it forms part of the argument by which the Lord Justice maintained the now discredited theory that domicile was not the basis of jurisdiction in divorce. But what is more important is the fact that, even if it is accepted as valid, it is merely an authority against the view that jurisdiction in nullity rests on domicile alone. It neither asserts nor implies the view that jurisdiction in nullity can never rest on domicile. But it is extremely difficult to admit that the dictum is valid, for it implies that a marriage which can be annulled does not effect a change in the

(*u*) *Hay v. Northcote*, [1900] 2 Ch. 262.

(*x*) Westlake, s. 49, citing *Williams v. Dormer* (1852), 2 Rob. 505. In *Moore v. Bull*, [1891] P. 279, 281, the validity of the annulment of a marriage celebrated in England by the Court of the country where the parties were domiciled or resident was assumed, but merely for the purpose of deciding the case. The residence need not be of any long duration, see *Korel v. Korel*, *The Times*, May 28, 1921.

(*y*) Westlake, s. 49.

(*z*) (1878), 4 P. D. (C. A.) 1, 9.

domicil of the wife (a); this doctrine can hardly be conceded; a marriage must be assumed to be valid and to have full effect until it is declared to be a nullity by a competent Court; on the making of such a declaration the woman will regain her former domicil, but until then she must be held to have that of her husband, in every case at any rate where the marriage is voidable and not void *ab initio*.

Apart from this dictum there appears to be no judicial authority in favour of the denial of jurisdiction based on domicil. As Westlake admits, the alleged wife, being a defendant and maintaining the marriage, is bound by her own contention to submit to the jurisdiction of the petitioner's domicil (b). In Ireland the case suggested as impossible of acceptance by James, L. J., has actually occurred, and the Court deliberately held that jurisdiction could be exercised on the basis of the Irish domicil of the husband, being the respondent (c). The decision is the more important because the respondent was permanently resident in Ireland, and the case could have been decided on that ground which was also alleged, but which the Court ignored. There is also further judicial authority, both earlier (d) and later (e) than the dictum, in favour of jurisdiction on the ground of domicil. Moreover, the exercise of jurisdiction on the score of domicil appears specially justifiable, when it is remembered that status is dependent on a decree in a nullity suit, and the Court of the domicil is obviously the best qualified to pronounce a decree affecting status.

In *Roberts v. Brennan* (f) jurisdiction seems to have been exer-

(a) This doctrine is also enunciated in *Ogden v. Ogden*, [1908] P. (C. A.) 46, 78, but in the same judgment the validity of domicil as a basis of jurisdiction is conceded (p. 80), no attempt being made to reconcile the two doctrines. A marriage, even if void (and not merely voidable), is the basis of rights under the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1; *Ramsay v. Ramsay* (1913), 108 L. T. 382.

(b) *Chichester v. Donegal* (1822), 1 Add. 5, 19.

(c) *Johnson v. Cooke*, [1898] 2 Ir. R. 130.

(d) *Ruding v. Smith* (1821), 2 Hagg. Cons. 371. The report makes it clear that the husband's domicil was English, but it is not certain whether domicil or residence was the basis of jurisdiction.

(e) *Bater v. Bater*, [1906] P. 209, 220; *Ogden v. Ogden*, [1908] P. (C. A.) 46, 80, *per Curiam*. In *Lawford v. Davies* (1878), 4 P. D. 61, both parties were domiciled in England, but the report does not state whether jurisdiction was exercised on the ground of domicil or residence. There is similar doubt as to the ground of jurisdiction in *Middleton v. Janverin* (1802), 2 Hagg. Cons. 437.

(f) [1902] P. 143. In *Ogden v. Ogden*, [1908] P. (C. A.) 46, 80, the case is treated as a decision based on residence. It is, however, clear from the report

cised on the ground that for some part of the time subsequent to the marriage the parties had their matrimonial home in England, though never domiciled there. The suit, however, was undefended, and the propriety of the exercise of jurisdiction in such a case was not argued.

Illustrations.

1. *H*, a Frenchman, and *W*, a Frenchwoman, domiciled in France, are married in London in accordance with all the formalities required by English law, but without the consents required by French law. The marriage is declared a nullity by a French Court. *W*, when residing in England, petitions to have the marriage declared a nullity. *H* is in Italy, and, though summoned, does not appear. The Court has jurisdiction to entertain a suit for the declaration of the nullity of the marriage, *i.e.*, to determine whether the marriage is valid (*g*).

2. *H* is a Dutchman and *W* a Dutchwoman. They are married in England. At that time they are both probably domiciled in England. At the time of the marriage between *H* and *W*, *H* is, in fact, married to another woman then living. Afterwards and during the lifetime of *H*, *W* marries *N*, who is domiciled in a foreign country. *W* brings a suit for a declaration of the nullity of the marriage with *H*. Neither *W* nor *H* is then domiciled in England. The Court has jurisdiction to entertain the suit, *i.e.*, to determine whether the marriage is valid (*h*).

3. *H*, a Frenchman, domiciled in France, marries *W*, an Englishwoman, domiciled in England. The marriage is solemnized before the British Consul at Bordeaux under and in accordance with the Foreign Marriage Act, 1892. It is declared invalid by a French Court. The English Court has jurisdiction to entertain a suit for the declaration of nullity, *i.e.*, to determine whether the marriage is valid (*i*).

4. *H* is a Frenchman who has married *W*, a Frenchwoman, in France. *H*, though not domiciled, is permanently resident in England. *W* brings a suit for a declaration of nullity. The Court (*semble*) has jurisdiction to entertain the suit.

that the husband, who was the respondent, was not resident in England when the suit was commenced.

(*g*) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97; *Linke v. Van Aerde* (1894), 10 T. L. R. 426; *Sproule v. Hopkins*, [1903] 2 Ir. R. 133.

(*h*) *Linke v. Van Aerde* (1894), 10 T. L. R. 426.

(*i*) *Hay v. Northcote*, [1900] 2 Ch. 262.

5. *H*, a British subject domiciled in England, goes through a form of marriage at the Cape of Good Hope with *W*, who is domiciled in a West Indian island. They come to England, but disputes arise and *W* takes up her residence in Scotland. *H* brings a suit for declaration of nullity on the ground of the invalidity of the marriage ceremony. The Court has jurisdiction (*k*).

6. *H*, a British subject domiciled in England, marries in India *W*, a British subject domiciled in Ireland. *H* and *W* return to England in due course. *W* then finds that *H* was already married to *N* in England before the date of the marriage in India. *W* brings a suit for declaration of nullity of marriage. The Court has jurisdiction (*l*).

7. The circumstances are as in the preceding illustration, except that, before *W* can institute proceedings, *H*, apprehensive of criminal proceedings being taken against him for his bigamous marriage to *W*, leaves England. *W* brings suit. The Court (*semble*) has jurisdiction (*m*).

IV. DECLARATION OF LEGITIMACY.

RULE 66 (*n*).

(1) Any natural-born British subject, or any person whose right to be deemed a natural-born British subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court, praying the Court for a decree declaring that the petitioner is the legitimate

(*k*) Compare *Ruding v. Smith* (1821), 2 Hagg. Cons. 371.

(*l*) Compare *Johnson v. Cooke*, [1898] 2 Ir. R. 130. *H* is resident, and jurisdiction could also be based on that ground.

(*m*) It is assumed that *H* has not changed his domicile, but is merely keeping out of the way for the time being. In cases such as this it would clearly be a matter of the utmost hardship if the Court of the husband's domicile could not exercise jurisdiction.

(*n*) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), ss. 1, 2, 8.

child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to the Court for a decree declaring that his marriage was, or is, a valid marriage; and the Court has jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the Court may seem just; and such decree, except as hereinafter mentioned, is binding to all intents and purposes on the Crown, and on all persons whomsoever.

- (2) Any person, being so domiciled or claiming as aforesaid, may apply by petition to the Court for a decree declaratory of his right to be deemed a natural-born British subject, and the Court has jurisdiction to hear and determine such application, and to make such decree thereon as to the Court may seem just; and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the Court, except as hereinafter mentioned, is valid and binding to all intents and purposes upon the Crown and all persons whomsoever (o).

(o) Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), s. 2.

- (3) The decree of the Court does not in any case prejudice any person, unless such person has been cited or made a party to the proceedings, or is the heir-at-law or next of kin, or other real or personal representative of, or derives title under or through, a person so cited or made a party; nor shall such sentence or decree of the Court prejudice any person, if subsequently proved to have been obtained by fraud or collusion (*p*).

Comment.

Conditions of Jurisdiction.—The jurisdiction of the Court depends upon the petitioner fulfilling certain conditions:—

1. He must be a *natural-born* British subject (*q*), or a person claiming to be a natural-born British subject; and it is doubtful whether, in spite of the wide terms of the British Nationality and Status of Aliens Act, 1914, s. 3 (*r*), an alien to whom a certificate of naturalization is granted is a natural-born British subject within Rule 66 (*s*).

2. The petitioner must at the time of presenting his petition either be domiciled in England or Ireland, or claim real or personal estate in England (*t*).

He does not fulfil the requirements of our Rule if he is domiciled

(*p*) The Legitimacy Declaration Act, 1858, s. 8. This Rule in substance repeats sects. 1, 2 and 8 of the Legitimacy Declaration Act, 1858, with one or two verbal alterations intended simply to make it read as a Rule. It is to be noted that the Court referred to in the Act is the Court for Divorce and Matrimonial Causes. But the original jurisdiction of this Court has been transferred to the High Court (see Judicature Act, 1873, ss. 3, 4, 16), and is in effect exercised by the Probate, Divorce and Admiralty Division of the High Court. *Ibid.*, s. 31.

As to Ireland, see the Legitimacy Declaration Act (Ireland), 1868 (31 Vict. c. 20); and as to Scotland, see Duncan and Dykes, *Principles of Civil Jurisdiction*, chap. xiii.; Maclaren, *Court of Session Practice*, pp. 61, 62, and the Legitimacy Declaration Act, 1858, s. 9.

(*q*) As to natural-born British subjects, see pp. 168, 169—181, *ante*.

(*r*) See Rule 28, p. 185, *ante*.

(*s*) *I.e.*, within the Legitimacy Declaration Act, 1858.

(*t*) 21 & 22 Vict. c. 93, ss. 1 and 2.

out of England and Ireland (*e.g.*, in the Isle of Man), unless he claims property in England (*u*). It will not bring him within it if, when domiciled, *e.g.*, in Scotland, he claims property in Ireland.

While the petitioner's domicile may be either English or *Irish* the estate claimed must be in England.

3. He must petition the Court to declare one or any of the following things:—

- (a) The legitimacy of the petitioner.
- (b) The validity of the petitioner's own marriage.
- (c) The validity of the marriage of the petitioner's parents or grandparents.
- (d) The petitioner's right to be a natural-born British subject.

Nature of Jurisdiction.—When the above conditions are fulfilled (*x*) (and not otherwise), the Court has jurisdiction to declare—

- (i) The legitimacy or the illegitimacy of the petitioner.
- (ii) The validity or invalidity of any marriage which the Court is petitioned to declare valid.
- (iii) That the petitioner has, or has not, a right to be deemed a natural-born British subject.

This jurisdiction applies as well to past as to existing marriages, and is a totally different thing from the authority inherited by the Court from the Ecclesiastical Courts to entertain a suit for the declaration of the nullity of an existing marriage (*y*). A petitioner cannot, under Rule 66 (*i.e.*, under the Legitimacy Declaration Act, 1858), pray to have a marriage declared invalid, or any person declared illegitimate, or not a British subject, though the decree of the Court may declare invalid a marriage which it is asked to declare valid, and, when asked to declare the legitimacy or the British nationality of the petitioner, may declare that he is illegitimate, or is not a natural-born British subject (*z*).

(*u*) *Johnston v. Attorney-General* (1873), 43 L. J. P. & M. 3.

(*x*) Compare *Shaw v. Attorney-General* (1870), L. R. 2 P. & M. 156; *Mansel v. Attorney-General* (1877), 2 P. D. 265; (1879), 4 P. D. 232; *Scott v. Attorney-General* (1886), 11 P. D. 128; *Brinkley v. Attorney-General* (1890), 15 P. D. 76; *Armitage v. Attorney-General*, [1906] P. 135; *Slingsby v. Attorney-General* (1915), 31 T. L. R. 246; (1916), 32 T. L. R. (C. A.) 364; 33 T. L. R. (H. L.) 120.

(*y*) See Rule 65, p. 300, *ante*.

(*z*) 21 & 22 Vict. c. 93, s. 1. See *In re Chaplin's Petition* (1867), 36 L. J. P. & M. 90.

The decree of the Court is *primâ facie* valid, and binding to all intents and purposes upon all persons whomsoever, including the Crown; but if certain persons interested in the decree are not cited, neither they nor their representatives are prejudiced thereby (*a*), and the decree is, like other judgments, ineffective (*i.e.*, it does not prejudice any person), if proved to have been obtained by fraud or collusion (*b*).

Illustrations.

1. *A*, a natural-born British subject domiciled in England, marries first at Cape Town, and then in London, *N*, who has been divorced at Cape Town from her husband for adultery with *A*. The validity of either marriage under the law of Cape Town is doubtful. *A* petitions to have his marriage with *N* declared valid. The Court has jurisdiction (*c*).

2. *A*, a natural-born British subject whose domicile is Irish, is for a time settled in Japan, and there marries a Japanese woman according to forms required by Japanese law. *A* petitions for a declaration that his marriage is valid. The Court has jurisdiction (*d*).

3. *A* is a natural-born British subject domiciled in France, and claiming a freehold estate in Middlesex. *A* petitions to have himself declared the legitimate son of his parents, or to have the marriage in France of his parents declared valid. The Court has jurisdiction.

4. *A* is born, and is domiciled, in France, and has lived in France till the age of 22. *A*'s father was also born in France, *A*'s paternal grandfather was an Englishman born in England, who married, or is alleged to have married, *A*'s grandmother at Paris. *A* claims a freehold estate in Middlesex. *A* petitions to have the marriage of his grandfather and grandmother declared valid. The Court has jurisdiction (*e*).

(*a*) See Rule 66, clause 3, p. 307, *ante*; and 21 & 22 Vict. c. 93, s. 8.

(*b*) *Ibid.*; and see, as to effect of foreign judgments in England, chap. xvii., especially Rule 105, p. 433, *post*; and compare generally, as to due acquisition of rights, Intro., General Principle No. I., p. 23, *ante*.

(*c*) *Scott v. Attorney-General* (1886), 11 P. D. 128.

(*d*) *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

(*e*) This case is certainly within the words of the Legitimacy Declaration Act, 1858, s. 2. Now, however, that an alien can take, acquire, hold and dispose of real or personal property of any description in the United Kingdom (British

5. The circumstances are the same as in Illustration No. 4, except that *A* petitions to be declared a natural-born British subject. The Court has jurisdiction (*f*).

6. *A* is a Frenchman who has become a naturalized British subject under the British Nationality and Status of Aliens Act, 1914; he is domiciled in England; he petitions to have it declared that he is the legitimate child of his parents. Whether the Court has jurisdiction? (*g*).

7. *A* is a natural-born British subject domiciled in France. He claims to succeed, as next of kin, to *goods* situate in England. He petitions to have himself declared the legitimate son of his parents. The Court has jurisdiction.

8. *A* is a natural-born British subject. He is domiciled in Scotland. He claims real estate in Ireland. He petitions to be declared the legitimate child of his parents. The Court has no jurisdiction (*h*).

9. *A*, a natural-born British subject domiciled in England, petitions the Court for a declaration that he is his father's heir at law. The Court has no jurisdiction (*i*).

10. *A* alleges in his petition that the marriage of the petitioner's grandfather with the petitioner's grandmother is a valid marriage, and that he is entitled to succeed to a baronetcy. The Court has no jurisdiction to adjudicate upon a claim to a title of honour (*k*).

11. *A*, a natural-born British subject domiciled in England, marries a citizen of the United States, domiciled in the State of New York. Her marriage is dissolved by divorce, and *A* marries *H*, a domiciled Englishman. Doubts having arisen as to the

Nationality and Status of Aliens Act, 1914, s. 17), it appears to a certain extent an anomaly that a claim to real estate in England should be a sufficient ground to give the Court jurisdiction to declare the claimant a British subject.

(*f*) *Ibid*.

(*g*) Whether the Court has jurisdiction or not depends upon the answer to the question whether the effect of the British Nationality and Status of Aliens Act, 1914, s. 3, is to make the petitioner a natural-born British subject within the meaning of 21 & 22 Vict. c. 93, s. 1. See Rules 28 and 31, pp. 185, 190, *ante*. Compare Rule 195, *post*.

(*h*) The petitioner is neither domiciled in England nor in Ireland, nor does he claim real or personal estate in England.

(*i*) *Mansel v. Attorney-General* (1877), 2 P. D. 265; (1879), 4 P. D. 232.

(*k*) *Frederick v. Attorney-General* (1874), L. R. 3 P. & D. 196. The decision of the Court may, of course, indirectly decide who is entitled to succeed.

validity of her second marriage, *A* petitions that the marriage with *H* may be declared valid. The Court has jurisdiction (*l*).

(*l*) *Armitage v. Attorney-General*, [1906] P. 135. The precise ground on which the petition was entertained does not appear from the report. Presumably *A* was a person whose right to be deemed a natural-born British subject depended on the validity of her marriage with *H*, unless indeed it is held that the words "any natural-born subject" cover a person who has lost her British nationality by marriage. But it is clear that *A* was only domiciled in England if her marriage with *H* were valid, and the petition did not allege that she was claiming any property in England. Moreover there is no other authority for the view that under the Naturalization Act, 1870, s. 10, sub-s. 1, an alien who becomes a British subject by marriage is thus converted into a natural-born British subject, though *Jaffé v. Keel*, [1916] 2 K. B. 476, shows that such a woman is not regarded as a naturalized British subject, if her husband is naturalized.

CHAPTER VIII.

JURISDICTION IN BANKRUPTCY AND IN REGARD
TO WINDING-UP OF COMPANIES.I. BANKRUPTCY (*a*).*Interpretation of Terms.*

RULE 67.—In this Rule, and in all the Rules of this Digest which refer to an English bankruptcy, the following terms have, unless the contrary appear from the context, the following meanings:—

(1) “The Court” means the Court having jurisdiction in bankruptcy under the Bankruptcy Act, 1914, and includes—

- (i) the High Court, and
- (ii) the County Courts (*b*).

(2) The expression “debtor,” unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him—

(a) was personally present in England; or

(a) See the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 127—130.

It is not the aim of these Rules to enumerate all the circumstances upon which the jurisdiction of the Court depends, and still less to state generally the law of bankruptcy. These Rules, further, do not state the circumstances under which bankruptcy proceedings should be taken in the High Court or in the County Courts respectively. All the English Bankruptcy Courts are, for the purpose of these Rules, treated as if they were one Court. The object, in short, of these Rules in regard to bankruptcy is to show how far the jurisdiction of the High Court is or is not affected by a given case containing some foreign element, *e.g.*, by the debtor being an alien domiciled abroad, or by his debts having been incurred wholly abroad. On the subject generally, see Baldwin, *Law of Bankruptcy* (11th ed.), and Williams, *Law and Practice in Bankruptcy* (11th ed.).

(b) The Bankruptcy Act, 1914, ss. 167 and 96.

- (b) ordinarily resided or had a place of residence in England; or
 - (c) was carrying on business in England, personally, or by means of an agent, or manager; or
 - (d) was a member of a firm or partnership which carried on business in England (c).
- (3) "An act of bankruptcy" means any one or more of the following acts when committed by a debtor:
- (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally;
 - (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof;
 - (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under the Bankruptcy Act, 1914, or any other Act be void as a fraudulent preference if he were adjudged bankrupt;
 - (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house;
 - (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days;

(c) Bankruptcy Act, 1914, s. 1 (2).

- (f) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself;
 - (g) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere (*d*), a bankruptcy notice under the Bankruptcy Act, 1914, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counter-claim, set off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained;
 - (h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts (*e*).
- (4) "A petition" means a petition presented to the Court either by a creditor (called a petitioning creditor) or by a debtor (called a petitioning debtor) that the Court shall make a receiving order, which is the first step towards a debtor being adjudicated a bankrupt (*f*).

(*d*) How far this authorises service on a foreigner domiciled abroad was dubious. See Baldwin, p. 160; Williams, p. 27; but see now Ord. XI. r. 8 a (July, 1920).

(*e*) Bankruptcy Act, 1914, s. 1 (1) (a) to (h).

(*f*) See 2 Steph. Comm. (14th ed.), p. 195.

Comment.

(1) "The Court."—This term hardly needs explanation: it simply points out that for the purpose of this Digest, as indeed for the purpose of the Bankruptcy Act, 1914, the Courts having jurisdiction in bankruptcy are described as one Court, and, except on matters with which this Digest is not concerned, may be considered as the High Court.

(2) "Debtor."—The definition of "debtor" deserves very careful attention. For many years before the passing of the Bankruptcy Act, 1914, it was felt that the word "debtor" in reference to the English bankruptcy law could not be used in its vague and popular sense. There was great difficulty in avoiding either a too narrow or a too general use of the word. If, for instance, the English Bankruptcy Court dealt only with debtors who were British subjects and who had contracted debts in England, it would have had no power to make bankrupt either English merchants who had contracted debts abroad, *e.g.*, in France, or aliens, *e.g.*, French citizens, who, carrying on business in England and making great profits from the English trade, had contracted heavy debts to English merchants. If, on the other hand, the English Bankruptcy Court tried to adjudicate bankrupt every debtor who had contracted a heavy debt to an English merchant, it was certain that the Bankruptcy Court would find itself engaged in the futile effort to adjudicate bankrupt debtors living in foreign countries who neither owed obedience to English law, nor in many cases could be compelled to obey the judgment of an English Court. It became, in short, clear to English judges that, to use an expression which is often employed in judgments delivered under the earlier Bankruptcy Acts, as regards our Bankruptcy Court, the word "debtor" should if possible be confined to "a person subject to the English bankruptcy law," but it at the same time became apparent that to define who were the persons who were subject to the English bankruptcy law was no easy task (*g*). The present definition of a "debtor" is intended to determine legislatively the circumstances which render a debtor

(*g*) Dicey, *Conflict* (2nd ed.), pp. 279—282; and compare *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522, 531; *In re Pearson*, [1892] 2 Q. B. (C. A.) 263; *Ex parte Crispin* (1873), L. R. 8 Ch. 374, 379; *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509, 512. As to the present state of the law consult Baldwin, pp. 14—17. 62—66; Williams, pp. 34, 49, 518.

a person subject to the English bankruptcy law, and is, it is submitted, exhaustive (*h*).

(3) "An act of bankruptcy."—For the full understanding of this term which, in common with the definition of a "debtor," lies at the very basis of the Court's bankruptcy jurisdiction, a reader should consult treatises on the Law of Bankruptcy (*i*), which comment on each of the acts of bankruptcy which can be committed by a debtor and the commission of one at least whereof is essential to a debtor being adjudicated a bankrupt. It is enough, however, for our present purpose to call attention to the following reflections:—

1. Every act which can constitute an act of bankruptcy is enumerated in this Rule.

2. Any transaction which is to constitute an act of bankruptcy must, unless the contrary is apparent from the terms of this Rule, have occurred *in England* (*k*).

3. Of the acts of bankruptcy enumerated in this Rule, some, *e.g.*, those included in clauses (a), (b) and (c), can be committed either in England or in any other country; others, *e.g.*, those included in clauses (e) and (f), must be committed in England; and some, it would seem, must, as to part of the transaction constituting the act of bankruptcy, be committed in England, but may, as to other portions of it, be committed out of England. Such would appear to be the case as to some at any rate of the acts included in clauses (d) and (g).

4. The dealings with a debtor's property which constitute an act of bankruptcy under clauses (a), (b), and (c), may take place either in England "or elsewhere." But it has been suggested or laid down by very high authority that a conveyance, or the like, made out of England must, if it is to be an act of bankruptcy, be a conveyance "which is to operate according to English law" (*l*).

To this suggested limitation or proviso it is hard to attach a very definite meaning. The proviso is (it is conceived) intended to exclude from the character of acts of bankruptcy acts done abroad by a foreigner not domiciled in England, and not intended

(*h*) On the effect of this definition of "debtor," see Comment and Illustrations on Rules 68, 69, pp. 317, 320.

(*i*) Baldwin, pp. 97—106.

(*k*) Baldwin, p. 93, citing *Ingliss v. Grant* (1794), 5 T. R. 530.

(*l*) See *Ex parte Crispin* (1873), L. R. 8 Ch. 374, 380, judgment of Court delivered by Mellish, L. J.

to operate at all according to English law, *i.e.*, not intended to have any effect on property in England (*m*).

5. Whether a debtor does or does not commit an act of bankruptcy under clause (d), *e.g.*, by departing out of England or remaining out of England, may depend upon the answer to the question whether he is or is not an Englishman living in England; for the words of the clause "imply that the person who remains "out of England has his home or place of business in England, "and cannot reasonably be held to apply to the case of a foreigner "remaining in his own home" (*n*).

6. An act of bankruptcy must be a personal act or default, and it can not be committed through an agent unless the agent is authorized to do the particular act, nor by a firm as such (*o*). Thus *X* is a Chilian subject, who has never been in England, but he is a member of an English firm which trades and contracts debts in England. An action is brought against the firm, judgment is obtained, and execution is issued, under which the goods of the firm are seized and sold. The seizure and sale of the goods is not an act of bankruptcy on the part of *X*.

(4) "A petition."—The petition hardly needs explanation: it is the written document by which generally a creditor (called a petitioning creditor), but occasionally a debtor (called a petitioning debtor), requests the Court to take the first step towards adjudicating such debtor a bankrupt.

Proceedings to adjudicate a debtor a bankrupt usually (*p*) commence with a petition either from a petitioning creditor or from a petitioning debtor.

(A) WHERE COURT HAS NO JURISDICTION.

RULE 68.—The Court has no jurisdiction on a bankruptcy petition being presented by a creditor or a debtor to adjudicate bankrupt any person who

(*m*) Compare Williams, p. 16, and contrast Baldwin, pp. 110, 111.

(*n*) *Ex parte Crispin* (1873), L. R. 8 Ch. 374, 380, judgment of Court delivered by Mellish, L. J. The word "foreigner" covers both an alien and a person who, though not an alien, belongs to any other country than England, *e.g.*, a Canadian. Compare *Ex parte Gutierrez* (1879), 11 Ch. D. (C. A.) 298; *Ex parte Brandon* (1884), 25 Ch. D. (C. A.) 500.

(*o*) *Ex parte Blain* (1879), 12 Ch. D. (C. A.) 522; compare Baldwin, p. 98.

(*p*) For an exception, see Rule 69, proviso, p. 321, *post*.

- (1) is not a debtor as defined in Rule 67 (2),
ante (q), or
- (2) has not committed or suffered any act of bankruptcy as defined in Rule 67 (3), *ante* (r).

Comment.

This Rule is most important. It virtually contains or suggests the principle which restricts the jurisdiction of the Bankruptcy Act, 1914, namely, that no debtor should come within its operation who is not a debtor as defined in Rule 67 (2), *ante*, and, therefore, ought to be legally and morally subject to the English bankruptcy law, and next, that no debtor shall be adjudicated bankrupt who has not distinctly committed an act of bankruptcy as defined in the said Rule. The operation of this principle and the difficulties which may arise in applying it are best shown by illustrations.

Illustrations (s).

1. X, the alleged debtor, incurs heavy debts in England whilst staying there for a fortnight. X then goes to France, and whilst in France makes a conveyance of his property to a trustee for the benefit of his creditors generally. A, a creditor, presents a bankruptcy petition against X. The Court has no jurisdiction (t).

2. The circumstances are the same as in Illustration 1, except that X, though often coming to England for a month or two, has not, at the time of committing the act of bankruptcy, ordinarily resided or had a place of residence in England. The Court has no jurisdiction.

3. X is, as in both Illustrations 1 and 2, in France at the time when the act of bankruptcy is committed, and at that time he neither is carrying on business in England personally or by means of an agent or manager, nor is a member of a firm or partnership

(q) *I.e.*, Bankruptcy Act, 1914, s. 1, sub-s. 2.

(r) Bankruptcy Act, 1914, s. 1, sub-s. 1.

(s) It is for the sake of brevity assumed throughout these illustrations that a bankruptcy petition has been presented against the debtor, and that the circumstances mentioned are the only ones which require consideration in order to determine whether the Court has or has not jurisdiction.

(t) X was not at the time of committing the act of bankruptcy present in England.

which carries on business in England. The Court has no jurisdiction (*u*).

4. X resides about half the year in England and about half the year in France. He has contracted heavy debts in each country. At the moment when he makes a conveyance of his property to a trustee for the benefit of his creditors he is in France. X, further, though as a rule he resides at least half the year in London, does not have any one fixed place of residence there, but lives in different hotels. Whether the Court has jurisdiction? (*x*)

5. X, though at the time when he makes a conveyance of his property to a trustee for the benefit of his creditors he generally is in France, and has never been in England for years, yet has had for years, and still has, a dwelling-house in London furnished and with servants in it, in which he could at any moment reside if he came there. *Seemle*, the Court has jurisdiction (*y*).

6. X is a French citizen, ordinarily residing and having a place of business in England. Knowing that he is on the point of bankruptcy for debts incurred in England amounting to 10,000*l.*, X goes to France, there borrows from a friend, who knows his circumstances, 2,000*l.* X gambles therewith at Monte Carlo and wins 20,000*l.* He gives 5,000*l.* to the friend who lent him the 2,000*l.*, and with the residue of the money goes to the United States with the intention of speculating there on the stock exchange. *Seemle*, the Court has jurisdiction? (*z*).

(*u*) In each of these Illustrations the reason why the Court has no jurisdiction is that X is not a debtor within the terms of Rule 67 (2), *ante*, *i.e.*, of the Bankruptcy Act, 1914, s. 1 (2), though in each illustration X has committed an act of bankruptcy.

(*x*) The question is whether X is ordinarily residing in England?

(*y*) *I.e.*, on the ground that X, though in France, and though generally living in France, has a place of residence in England. *In re Nordenfelt*, [1895] 1 Q. B. (C. A.) 151.

(*z*) This seems to be so on the strict wording of the Bankruptcy Act, 1914, s. 1, sub-s. 1 (b) and (c). This conclusion is, however, very doubtful. X is no doubt a debtor within the Bankruptcy Act, 1914, s. 1 (2) (b). X's conduct does obviously inflict damage upon English creditors, but on the other hand, *Ex parte Crispin* (1873), L. R. 8 Ch. 734, seems at first sight to show that conduct falling within the Bankruptcy Act, 1914, s. 1 (1) (b), (c), or (d), does not apply to such a case as is stated in this illustration. One must, however, remember that under the Bankruptcy Act, 1914, X is clearly a debtor, which is not perfectly certain under the Act of 1869, and that the point clearly decided by *Ex parte Crispin* is that a foreign debtor's return to his own country is not necessarily an act of bankruptcy within the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71) s. 6 (3). But see Williams, p. 16, as to the effect of *Ex parte Crispin*, and especially *Cooke v. Charles A. Vogeler Co.*,

7. *X* is a Frenchman who generally resides in England, but he keeps up a connection with France, where he has relatives and landed property. *X* contracts in England large debts to *A*. *A* brings an action against *X* and serves *X* with a writ. *X* in consequence leaves England for France. *A* presents a bankruptcy petition against *X*. The alleged act of bankruptcy is that *X* has departed out of England with intent to defeat his creditors. *Seemle*, the Court has no jurisdiction (*a*).

8. *X* is a Frenchman domiciled in and living in France. He visits London, where he incurs debts amounting to 10,000*l*. *X*, being unable to pay these debts, while resident at Paris, presents a bankruptcy petition to the Court. The Court has no jurisdiction (*b*).

RULE 69 (*c*).—As a creditor is not entitled to present a bankruptcy petition against a debtor, so the Court has no jurisdiction to adjudicate a debtor a bankrupt unless—

- (a) the debt owing by the debtor to the petitioning creditor or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to fifty pounds, and
- (b) the debt is a liquidated sum payable either immediately or at some future time, and
- (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and

[1901] A. C. 102, 108, 109, per Lord Halsbury, 114, per Lord Davey, 116, per Lord Brampton, which support Williams' view.

(a) *X* indeed is a debtor within Rule 67, p. 312, *ante*, but in the circumstances it is not clear that he has committed an act of bankruptcy, *i.e.*, that he has departed out of England with a view to defeat his creditors. See *Ex parte Crispin* (1873), L. R. 8 Ch. 374. Compare Conflict (2nd ed.) p. 278.

(b) *X* has clearly committed an act of bankruptcy, the presentation of the petition being under the Bankruptcy Act, 1914, s. 1, sub-s. 1, an act of bankruptcy (see Rule 67 (3) (f)). But he is not a debtor within Rule 67 (2), for he is not personally present in England when he presents his petition, nor does he ordinarily reside or carry on business in England, nor is he a member of a firm or partnership carrying on business in England.

(c) See the Bankruptcy Act, 1914, s. 4 (1).

- (d) the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided; or had a dwelling-house or place of business, in England, or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as afore-said) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners or an agent or manager.

Provided that in any case where under the Debtors Act, 1869, s. 5, application is made by a judgment creditor to a Court having bankruptcy jurisdiction for the committal of a judgment debtor, the Court may, if it sees fit, decline to commit, and, in lieu, with the consent of the judgment creditor, make a receiving order as against the debtor (*d*).

Comment and Illustrations.

This Rule presents some difficulty. Its obvious aim is to impose some restrictions on a creditor's right to present a petition in bankruptcy against a debtor, even in cases in which the debtor comes within the terms of Rule 67, *i.e.*, even where the debtor is obviously under the Bankruptcy Act, 1914, a person properly subject to the English bankruptcy law. But it looks at first sight as though our Rule 69, added to the qualifications, which ought to be found in a "debtor" as defined in Rule 67, the further qualification that such debtor should be domiciled in England. The apparent difficulty, however, is, we may suggest, removed by the following considerations: The two Rules 68 and 69, if read carefully together with Rule 67, though they, so to speak, run

(*d*) Bankruptcy Act, 1914, s. 107 (4); *Ex parte Clark*, [1898] 1 Q. B. (C. A.) 20.

across one another, aim at different objects. The object of Rule 68, taken together with Rule 67, is to ensure that the Court shall not adjudicate bankrupt any person unless he in strictness falls within the definition of a "debtor" given in Rule 67, and also shall have committed an indubitable act of bankruptcy. The aim of Rule 69 is not further to define the meaning of the word "debtor," but to ensure that no creditor shall be entitled to present a bankruptcy petition against a debtor, unless (1) the petitioning creditor fulfils certain conditions mentioned in Rule 69, *e.g.*, bases his petition upon a debt owing by the debtor amounting to fifty pounds, and further (2) unless the debtor either is domiciled in England (*e*), or within a year before the date of the presentation of the petition has fulfilled one or other of the conditions necessary for constituting a debtor as defined in Rule 67 (2) (b)—(d).

Thus Rule 68 lays down the general restrictions affecting the power of the Court to adjudicate any person bankrupt. Rule 69, on the other hand, deals with the right of a creditor to present a petition, and of the Court to make an order upon that petition, and restricts the right to the case where the debtor is either (1) domiciled in England, or (2) within a year before the date of the presentation of the petition has been in strictness a debtor as defined in Rule 67 (2) (b)—(d). The most important practical result of Rule 69 is that a creditor may not present a petition against a debtor merely because the debtor has committed an act of bankruptcy while present on a passing visit in England (*f*).

The difference between the two Rules will be seen from the following illustrations:—

Illustrations.

1. X is a debtor domiciled in France. X owes A 100*l*. X is, of course, not domiciled in England. X, however, at the time

(*e*) The burden of proving domicile rests on the creditor, see *In re Barne* (1886), 16 Q. B. D. (C. A.) 522. Compare *Ex parte Cunningham* (1884), 13 Q. B. D. (C. A.) 418; *Ex parte Langworthy* (1887), 3 T. L. R. 544.

(*f*) Compare *In re Clark*, *Ex parte Beyer, Peacock & Co.*, [1896] 2 Q. B. 476, decided under the provisions of the Bankruptcy Act, 1883, s. 6, sub-s. 1 (d). Under the Bankruptcy Act, 1914, provision is made by the Bankruptcy Rules, 1915, s. 158, for the service of a petition out of the jurisdiction against a petitioner who is not in England, while under sect. 156, substituted service can be allowed where evasion of service is attempted. See *In re Nelson*, [1918] 1 K. B. (C. A.) 456, 466, per Swinfen Eady, L. J., and compare *In re Urquhart* (1890), 24 Q. B. D. (C. A.) 723, decided under sect. 154 of the Rules under the Act of 1883. See also Ord. XI. r. 8a (July, 1920).

when he commits an act of bankruptcy resided or had a place of residence in England, *i.e.*, X came within the definition of a "debtor." The act of bankruptcy, moreover, on which the petition is grounded occurred within three months before the presentation of the petition. The Court has (*semble*) jurisdiction (*g*).

2. X, at the time when an act of bankruptcy is committed or suffered by him, has a domicile in England, but does not otherwise fulfil any of the conditions requisite to his being a debtor within the terms of Rule 67 (2). The Court has no jurisdiction to adjudicate X a bankrupt (*h*).

3. X, domiciled in France, while on a visit to London, notified A of his intention to suspend payment of his debts. He was not ordinarily resident in England, nor did he carry on business there, nor was he a member of a firm or partnership carrying on business there. The Court has no jurisdiction on application by A to adjudicate X a bankrupt (*i*).

4. X is an alien, not domiciled in England. He incurs a debt in England to A, who recovers judgment in England against him for 1,000*l*. In 1906 X is residing in France, and has not ordinarily resided or had a dwelling-house or place of business in England or been a member of a firm or partnership carrying on business there within the preceding year. He returns to England in order to pay a short visit to a friend. The Court has, in the circumstances, jurisdiction to commit him to prison as a judgment debtor under the Debtors Act, 1869, s. 5. The Court has jurisdiction to adjudge X a bankrupt (*k*).

(B) WHERE COURT HAS JURISDICTION.

(a) *On Creditor's Petition.*

RULE 70 (*l*).—Subject to the effect of Rules 68 and 69, the Court, on a bankruptcy petition being presented by

(*g*) The conditions of Rules 68 and 69, pp. 317, 320, *ante*, are satisfied.

(*h*) *I.e.*, within the Bankruptcy Act, 1914, s. 1, sub-s. 2.

(*i*) It is true that X is a debtor within Rule 67 (2), p. 312, *ante*, but he does not fall within the terms of Rule 69.

(*k*) This is an illustration of the proviso to Rule 69, and is the result of the combined effect of the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, and the Bankruptcy Act, 1914, s. 107, sub-s. 4. Compare *In re Clark*, [1896] 2 Q. B. (C. A.) 476; [1898] 1 Q. B. (C. A.) 20, which was decided under the Bankruptcy Act, 1883, s. 103, sub-s. 5.

(*l*) See Bankruptcy Act, 1914, ss. 3, 4, and 18.

a creditor, has jurisdiction to adjudge bankrupt any debtor (being otherwise liable to be adjudged bankrupt)(*m*) who has committed the act of bankruptcy on which the petition is grounded within three months before the presentation of the petition.

The jurisdiction of the Court is not affected

- (1) by the fact that the debt owing to the petitioning creditor was not contracted in England (*n*), or
- (2) by the absence of the debtor from England at the time of the presentation of the petition (*o*), or
- (3) by the fact that either the creditor or the debtor is an alien (*p*).

Comment.

The exercise of the Court's bankruptcy jurisdiction is to a certain extent discretionary. The Court may, on the petition of a creditor or of a debtor, decline to exercise jurisdiction which it undoubtedly possesses. Such refusal, for example, may be based on the ground that the debtor has been made bankrupt in another country (*q*), or generally on the existence of "any of those equitable considerations which have induced the Court . . . to say that, although the legal requisites to an adjudication were in all respects perfect, it was not equitable that the bankruptcy should proceed" (*r*). "It is not necessary," says Lord Justice James, "for us to say that in every case the words of [the Bankruptcy Act, 1869], section 8 (*s*), 'shall be adjudged bankrupt' (*t*), make the adjudication so clearly *ex debito justitiæ*

(*m*) These Rules are not concerned either with the steps which must be taken before a debtor can be adjudged bankrupt (see Bankruptcy Act, 1914, s. 18), or with the question whether proceedings should be taken in the High Court or in a County Court. (Bankruptcy Act, 1914, ss. 96, 102.)

(*n*) See *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509, 512, 513, judgment of James, L. J.

(*o*) *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

(*p*) *Ibid.*

(*q*) *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816. Compare *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716.

(*r*) *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716, 719, judgment of Bacon, C. J.

(*s*) With which compare Bankruptcy Act, 1914, ss. 5, 6, 18.

(*t*) The actual words are, "the Court shall adjudge the debtor to be bankrupt."

“that the Court has no discretion in the matter. The Chief Judge “has pointed out that, notwithstanding those words, the Court “retains its old jurisdiction to refuse to make a man bankrupt for “an improper purpose, and to annul an adjudication when the “justice and the convenience of the case require it” (u).

The jurisdiction of the Court is, as already pointed out, based, not on the petition, but on the commission of an act of bankruptcy by a debtor subject to the English bankruptcy law (x). Some circumstances, therefore, such for example as the place where the debt is contracted, which might *primâ facie* appear to affect the jurisdiction of the Court, are irrelevant. These circumstances are enumerated in clauses 1 to 3 of our Rule.

But though the fact that the debtor or the creditor is an alien does not, if an act of bankruptcy has been committed, affect the jurisdiction of the Court, the nationality, or even the residence, of the debtor may affect the question whether the debtor has committed an act of bankruptcy. Thus the departure from England of an Englishman domiciled in England may be an act of bankruptcy within Rule 67 (3), clause (d), where the departure from England of a foreigner, whether an alien or not, whose home is in a foreign country, would not be an act of bankruptcy (y).

Illustrations.

1. X, a Portuguese domiciled in Portugal, contracts a debt (z) to A in England. He commits an act of bankruptcy in England, where he has been ordinarily resident up to the time of committing the act of bankruptcy. X then leaves England for Portugal. A, within three months after the commission of the act of bankruptcy by X, presents a bankruptcy petition against X, grounded on the act of bankruptcy. X, at the time when the petition is presented, is resident in Portugal. The Court has jurisdiction to adjudge X bankrupt (a).

2. X is a Peruvian citizen domiciled in Peru, where he contracts

(u) *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716, 723, judgment of James, L. J. See *Re Bond* (1888), 21 Q. B. D. 17; *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640; *Ex parte Gibson* (1865), 34 L. J. (Bankruptcy) 31, 32.

(x) See pp. 317—320. *ante*.

(y) See *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

(z) It is assumed in these illustrations that the debt amounts to at least 50*l*.

(a) Compare *Ex parte Crispin* (1873), L. R. 8 Ch. 374.

In *Ex parte Crispin* the Court had no jurisdiction, because under the circumstances there was no evidence of X having committed an act of bankruptcy.

a debt to *A*, an Italian subject. *X* comes to reside in England, and resides there ordinarily for three months. *X* commits an act of bankruptcy in England. *A*, within a year from the time when *X* has ordinarily resided in England, and within three months from the commission of the act of bankruptcy, presents a petition against him grounded on such act. The Court has jurisdiction (*b*).

3. *X*, an Irishman domiciled in Ireland, carries on business at Dublin, and also at Liverpool, where he has a house of business. He commits an act of bankruptcy in England. A bankruptcy petition is immediately presented by a creditor against *X*. The Court has jurisdiction (*c*).

4. *X* is an American citizen and carries on business as a financial agent. His wife and family reside at Brussels. In November, 1886, *X* takes a room at the Hotel Metropole, Charing Cross. He keeps the room until the time when a bankruptcy petition against him is presented. During the period for which he takes the room he addresses his letters from the hotel, and goes backwards and forwards from the hotel. Under these circumstances *X* ordinarily resides in England. *X* commits an act of bankruptcy in England. *A*, within three months after the commission of the act of bankruptcy, presents a bankruptcy petition. The Court has jurisdiction (*d*).

(b) *On Debtor's Petition.*

RULE 71 (*e*).—The Court has, on a bankruptcy petition being presented by a debtor, alleging that the debtor is unable to pay his debts, jurisdiction to adjudge the debtor bankrupt.

(*b*) Compare *Ex parte Pascal* (1876), 1 Ch. D. (C. A.) 509.

In *Ex parte Pascal* the debtor had, perhaps, not been ordinarily residing in England. The case was decided under the Bankruptcy Act, 1869, and (*semble*) would, under the circumstances, have been otherwise decided if it had come under the Bankruptcy Act, 1914. It, however, distinctly decides that the fact of the parties being aliens does not affect the jurisdiction of the Court.

(*c*) *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716.

(*d*) *In re Norris* (1888), 4 T. L. R. 452. Whether *X*'s room at the hotel also constitutes a place of business depends upon the way in which it is used. See also *In re Nordenfelt*, [1895] 1 Q. B. (C. A.) 151; *In re Hecquard* (1889), 24 Q. B. D. (C. A.) 71.

(*e*) Bankruptcy Act, 1914, ss. 3, 6, 18.

Comment.

It will be observed that in this Rule no reference is made to the restrictions on the jurisdiction of the Court which are stated in Rule 69 (f). The omission is intentional.

Rule 69 applies (it is conceived) only to the case where a debtor is to be made bankrupt on the petition of a creditor. The jurisdiction, therefore, of the Court to adjudge a debtor bankrupt on his own petition is unaffected by the restrictions stated in that Rule, or, to put the same thing in other words, the Bankruptcy Act, 1914, s. 4, sub-s. 1 (d), on which Rule 69 is grounded, applies only where a debtor is to be made bankrupt on a creditor's petition. If this view of the bankruptcy law be correct, the Court has, in strictness, jurisdiction to make any debtor, as defined in Rule 67 (2), bankrupt on his own petition. The Court, however, may (g), and no doubt would, decline to exercise this jurisdiction whenever it would work injustice, and the absence of all local connection with England on the part of a petitioning debtor would be a strong reason for the Court's refusing, on grounds of equity and fairness, to make him bankrupt.

Illustrations.

1. X, an Englishman domiciled in England, incurs debt in France, and presents a petition alleging that he is unable to pay his debts. The Court has jurisdiction to adjudge X a bankrupt (h).

2. X is a British subject domiciled at Melbourne, Australia. He has at no time been ordinarily resident or had a dwelling-house or place of business in England. He has incurred debts both in Australia and in England. X presents a petition alleging that he is unable to pay his debts. Whether the Court has jurisdiction to adjudge X a bankrupt (i)? *Seemle*, the Court has jurisdiction, but may refuse to exercise it.

RULE 72 (k).—The jurisdiction of the Court to adjudge bankrupt a debtor on the petition of a creditor, or on the

(f) See pp. 317, 318, *ante*.

(g) *In re Betts, Ex parte Official Receiver*, [1901] 2 K. B. 39.

(h) Bankruptcy Act, 1914, ss. 3, 6.

(i) But see Westlake, s. 128.

(k) *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716; *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816; *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640.

petition of the debtor, is not taken away by the fact of the debtor being already adjudged bankrupt by the Court of a foreign country, whether such country do or do not form part of the British dominions.

Comment.

A debtor's bankruptcy, under the law of a foreign country, does not deprive the English Court of jurisdiction to adjudge him a bankrupt. But the fact of his having been made bankrupt in a foreign country (*e.g.*, Scotland or France) may be a reason against the Court's exercising its jurisdiction. Thus, where the debtor had already been made bankrupt in Scotland, the law was laid down as follows: "About the jurisdiction to make an adjudication I have no doubt; *Ex parte McCulloch* (l) settles that. "Of course there must be some reason for exercising it, and the "mere existence of a bankruptcy in Scotland or in Ireland would, " *primâ facie*, be a reason for not exercising it. Here the Scotch "sequestration is not closed; it does not appear that there are any "subsequent debts, or any assets in England, and there is no "reason for exercising the jurisdiction. . . . There ought not "to be an adjudication" (m).

Illustrations.

1. A carries on business at Monaghan in Ireland and at Liverpool in England. On the 3rd May a bankruptcy petition is presented against him in England. On the 4th May he is adjudicated bankrupt on his own petition in Ireland. On the 5th May the English Court has jurisdiction to adjudicate him bankrupt in England though the Irish bankruptcy is known to and brought before the attention of the Court (n).

2. On July 27, 1881, there is an unclosed sequestration against X in Scotland. In 1882 A in England presents a bankruptcy petition against X. The Court has jurisdiction to adjudge X bankrupt, though it is a matter of discretion whether the Court shall or shall not exercise its jurisdiction (o).

(l) (1880), 14 Ch. D. (C. A.) 716.

(m) *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816, 818, per Jessel, M. R.

(n) *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716. Though the English Court has jurisdiction, X's whole assets have already vested in the assignee under the Irish bankruptcy. See Rules 122, 125, pp. 471, 476, *post*.

(o) *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816.

II. WINDING-UP OF COMPANIES (*p*).

(A) WHERE COURT HAS NO JURISDICTION.

RULE 73.—The Court has no jurisdiction to wind up

- (1) any company registered in Scotland or in Ireland (*q*);
- (2) any unregistered company having a principal place of business situate in Scotland or in Ireland, but not having a principal place of business situate in England (*r*);
- (3) any unregistered foreign company which, though carrying on business in England, has no office in England (*s*);
- (4) any unregistered company which does not fall within the Companies (Consolidation) Act, 1908 (*t*).

The term “the Court,” in this Rule and in Rule 74, means any Court in England having jurisdiction to wind up a company under the Companies (Consolidation) Act, 1908, and the Acts amending the same, and includes the High Court and any other Court in England having such jurisdiction (*u*).

(*p*) Lindley, Company Law (6th ed.), Bk. iv., c. i., ss. 1 and 2, pp. 828—841; Westlake (5th ed.), ss. 131—133; Stiebel, Company Law (2nd ed.), chap. ix.; Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), ss. 131, 267. No reference is here necessary to the emergency legislation of the war period.

(*q*) Compare Companies (Consolidation) Act, 1908, ss. 134, 135.

(*r*) Companies (Consolidation) Act, 1908, s. 267, sub-s. 1 (1). Note the definition of an unregistered company, which means, speaking generally, any partnership, association, or company (other than a railway company) consisting of more than seven members, not registered under the Companies (Consolidation) Act, 1908, or earlier Acts, any trustee savings bank, and any limited partnership, and includes a foreign company formed under a foreign law. See *Reuss v. Bos* (1871), L. R. 5 H. L. 176; *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

(*s*) *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219, 220.

(*t*) See Lindley, Company Law (6th ed.), pp. 837—841.

(*u*) See Companies (Consolidation) Act, 1908, s. 131. All the English Courts having jurisdiction to wind up a company are, for the purpose of these Rules, treated as if they were one Court.

Comment.

1. *Registered in Scotland, &c.*—A company cannot be registered in more than one part of the United Kingdom, and jurisdiction to wind up a company registered in Scotland or in Ireland is given by the Companies Act to the proper Irish and Scottish Court exclusively (x).

2. *Unregistered.—Principal place of business in Scotland, &c.*—An unregistered company is to be wound up in that part of the United Kingdom where its principal place of business is situate. Hence a company which has not its principal place of business in England, but has its principal place of business, *e.g.*, in Scotland, must be wound up by the Scottish Court. But a company may have a “principal place of business” at the same time in more than one part of the United Kingdom, *e.g.*, both in England and in Scotland. In this case the proper English and Scottish Courts respectively have each jurisdiction to wind up the company (y).

3. *Unregistered.—Foreign company without office, &c.*—A foreign unregistered company may carry on business in England through agents without having any English office of its own. In this case the Court has no jurisdiction to wind it up.

“The jurisdiction,” says Pearson, J., “to wind up a company is “a purely statutory one under the Companies Acts. . . . I am “decidedly of opinion that the Act is confined to English companies, and foreign companies carrying on business in England “with, so to speak, a residence of their own—a branch office— “in this country. In the cases which have been cited (z) of orders “made to wind up foreign companies, the companies had an office “in England, but that is not so in the present case. I have no jurisdiction at all” (a).

4.—*Unregistered.—Company not within the Companies (Consolidation) Act, 1908.*—Though the definition of unregistered company in sect. 267 of the Companies (Consolidation) Act, 1908,

(x) Companies (Consolidation) Act, 1908, ss. 134, 135.

(y) See Rule 74, *post*; and Companies (Consolidation) Act, 1908, s. 268 (1) (i).

(z) *Viz.*, *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517; *In re Matheson* (1884), 27 Ch. D. 225; *Reuss v. Bos* (1871), L. R. 5 H. L. 176. Under the Companies (Consolidation) Act, 1908, s. 274, a foreign company, which establishes a place of business in England, must register an address for the service of process.

(a) *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219—221, judgment of Pearson, J. Compare Stiebel, Company Law, p. 906.

is extremely wide in terms, the adoption in sect. 268 of the place of business as the criterion of the choice of the Court by which jurisdiction in the United Kingdom is to be exercised is clear proof that only such societies are dealt with as exist for purposes of trading. Such bodies as municipal corporations, ecclesiastical corporations aggregate, learned societies incorporated by Royal Charter, and ordinary clubs, are exempt from the jurisdiction of the Court (b).

Illustrations.

1. X is a Scottish banking company having an office and registered in Scotland, but also having an office in London and carrying on a large business in England. The Court has no jurisdiction to wind up the company.

2. X is an unregistered company having a principal place of business in Edinburgh and a subordinate place of business in London. The Court has no jurisdiction to wind up the company (c).

3. X is a *société anonyme* for the carrying on of marine insurance. It is established at Genoa, and is authorised by a decree of the King of Italy. It is not registered under the Companies Act, 1862 (d). It carries on business in Italy and also in England. The business in England is carried on by means of agents, and X has no branch office of its own in England. The Court has no jurisdiction to wind up the company (e).

4. X is an ordinary club. The Court has no jurisdiction to wind it up.

(B) WHERE COURT HAS JURISDICTION.

RULE 74 (f).—Subject to the effect of Rule 73, the Court has jurisdiction to wind up—

(1) Any company registered in England (g);

(b) See *In re Bristol Athenæum* (1889), 43 Ch. D. 236; *In re St. James' Club* (1852), 2 De G. M. & G. 383; but compare *In re Victoria Society, Knottingley*, [1913] 1 Ch. 167, the case of a sick benefit club; Stiebel, *Company Law*, p. 906.

(c) Companies (Consolidation) Act, 1908, s. 268 (1) (i).

(d) This Act is one of those consolidated in the Act of 1908.

(e) *In re Lloyd Generale Italiano* (1885), 29 Ch. D. 219.

(f) Stiebel, *Company Law*, pp. 897—906; Companies (Consolidation) Act, 1908, ss. 131, 268.

(g) *Reuss v. Bos* (1871), L. R. 5 H. L. 176.

- (2) Any unregistered company having a principal place of business (*h*) in England ;
 (3) Any unregistered foreign company having a branch office (*i*) in England.

Comment.

There are two classes of companies which, subject to certain limited exceptions, the Court has jurisdiction to wind up.

1. *Registered in England*.—The Court has jurisdiction to wind up a company registered in England, whether it be an English or a foreign company. The jurisdiction is not taken away by the fact that the company is formed to carry on business abroad, nor by the fact of its consisting of foreigners, nor by the consideration that the registrar might have rightly declined to register the company (*k*). A company, moreover, which is capable of being registered at all, may be registered for the sole purpose of being wound up (*l*).

2. *Unregistered and having a principal place of business, &c.*—An unregistered company which has a principal place of business in England is, though it may also have another principal place of business in Scotland or in Ireland, precisely within the terms of the Companies (Consolidation) Act, 1908, s. 268 (1) (i), and the Court clearly has jurisdiction to wind it up.

3. *Unregistered foreign companies*.—These companies have been held to fall within the definition of unregistered company in the Companies Act, 1862, s. 199 (*m*), which is re-enacted in sect. 207 of the Companies (Consolidation) Act, 1908, and may be wound up by the Court if they have branch offices in England. But it must be noted that the exercise of this jurisdiction is discretionary, and the fact that the company was being wound up in the country under the law of which it is constituted might be a valid reason for the Court declining to exercise jurisdic-

(*h*) The Companies (Consolidation) Act, 1908, s. 268.

(*i*) *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517; *In re Matheson* (1884), 27 Ch. D. 225.

(*k*) *Reuss v. Bos* (1871), L. R. 5 H. L. 176.

(*l*) Lindley, *Company Law* (6th ed.), pp. 834, 835.

(*m*) See *In re Matheson Bros., Ltd.* (1884), 27 Ch. D. 225; *In re Mercantile Bank of Australia*, [1892] 2 Ch. 204; *In re Commercial Bank of South Australia* (1886), 33 Ch. D. 174; *In re Syrian Ottoman Railway Co.* (1904), 20 T. L. R. 217. As to service of a petition outside England, see Stibel, pp. 1163, 1164; Ord. XI. r. 8a.

tion (*n*). Moreover, the effect of the winding up of such a company by the Court is merely to terminate its existence as a company in so far as England is concerned; whether it operates to dissolve the corporation absolutely is a matter to be decided by the law of the country in which the company was constituted (*o*).

Illustrations.

1. X is a company duly registered in England under the Companies Act, 1862. The subscribers to the articles of association are all foreigners resident abroad. The objects of the company are mainly the transaction of business abroad, and the company has in fact carried on little or no business in England. The Court has jurisdiction to wind up the company (*p*).

2. X is a company formed for making a railway in Spain, and has a board of directors in Madrid and in London; the *locale* of the company is to be Spain, and its affairs are to be regulated by Spanish law. It is registered in England. The Court has jurisdiction to wind up the company (*q*).

3. X is an unregistered company having a principal place of business in London. The Court has jurisdiction to wind up the company (*r*).

4. X is an unregistered company, having a principal place of business both in Edinburgh and in London. The Court has jurisdiction to wind up the company (*s*).

5. An Anglo-Belgian company is constituted a *société anonyme*, with domicile at Brussels and a board of directors there and in London, where it has a branch office. The object of the company is to make a railway in Belgium. The Court has jurisdiction to wind up the company (*t*).

6. X is a joint-stock company formed in India and incorporated by registration under Indian law. It has a principal place of

(*n*) See *In re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, 394, per Vaughan Williams, J.

(*o*) Lindley, *Company Law* (6th ed.), p. 840; *In re Matheson Bros., Ltd.* (1884), 27 Ch. D. 225, 229.

(*p*) *In re General Co. for Promotion of Land Credit* (1870), L. R. 5 Ch. 363; *Reuss v. Bos* (1871), L. R. 5 H. L. 176.

(*q*) *In re Madrid, &c. Co.* (1849), 19 L. J. Ch. 260; 3 De G. & Sm. 127; *Re the Factage Parisien* (1864), 34 L. J. Ch. 140; *Re Peruvian Railways Co., Ltd.* (1867), L. R. 2 Ch. 617.

(*r*) Companies Act, 1908, s. 268 (1) (i).

(*s*) *Ibid.*

(*t*) Suggested by *Re Dendre Valley Co.* (1850), 19 L. J. Ch. 474.

business in India, but has a branch office and agent in England. The Court has jurisdiction to wind up the company (*u*).

7. *X* is an unregistered joint-stock company, formed and having its principal place of business in New Zealand, but has a branch office, agent, assets, and liabilities in England. The Court has jurisdiction to wind up the company (*x*).

8. *X* is a banking company incorporated and carrying on business in Australia, and is not registered in England, but has a branch office in London. The company has English creditors and assets in England. The Court has jurisdiction to wind up the company (*y*).

9. *X*, a banking company registered in India has branch offices in Edinburgh and in London. The London office is worked in subordination to that in Edinburgh. The Court has no jurisdiction.

(*u*) *In re Commercial Bank of India* (1868), L. R. 6 Eq. 517.

(*x*) *In re Matheson* (1884), 27 Ch. D. 225.

(*y*) *In re Commercial Bank of South Australia* (1886), 33 Ch. D. 174.

CHAPTER IX.

JURISDICTION IN MATTERS OF ADMINISTRATION
AND SUCCESSION.

RULE 75.—In this Digest, unless the context or subject-matter otherwise requires,

- (1) "Property" (*a*) means and includes :—
 - (i) any immovable ;
 - (ii) any movable.
- (2) "Administrator" includes an executor.
- (3) "Personal representative" includes an administrator, and also any person who, however designated, is under the law of any country entitled in such country to represent a deceased person, and, as his representative, to deal with the property of the deceased by way of administration.
- (4) "Foreign personal representative" means the personal representative of the deceased under the law of a foreign country.
- (5) "Administration" means the dealing according to law with the property of a deceased person by a personal representative.
- (6) "Succession" means beneficial succession to the property of a deceased person.
- (7) "Grant" means a grant of letters of administration, or of probate of a will.
- (8) "English grant" means a grant made by the Court.

(*a*) See, for the definition of immovable and movable, and as to division of property into immovables and movables, and as to its relation to the division into realty and personalty, pp. 68, 69, 75—77, *ante*. Compare, also, the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), Part I. ss. 1—5, 25.

- (9) "Assets" means such property of a deceased person as an administrator who has obtained an English grant is bound to account for or is chargeable with.

Comment.

(1) *Property*.—The division of property, or, in strictness, of the subjects of property or ownership, which is generally followed in this Digest, is the division into immovables and movables. With the different division of property followed by English lawyers into realty (or real property), and personalty (or personal property), we need not, for the purpose of this treatise, in general, concern ourselves. In some, however, of the Rules in this Digest, and certainly in the Rules which concern the jurisdiction of the High Court in matters of administration, it is necessary or convenient to keep in view the mode of division adopted by English law, and to understand clearly its relation to the division into immovables and movables; it is well also to keep before one's mind the meaning of certain terms of English law, *e.g.*, land (*b*), goods, and *choses in action*, which are closely connected with the division of property into real property and personal property (*c*).

(2) *Administrator*.—Under English law, the representative of a deceased person, in respect of his property, is always either an "administrator," *i.e.*, a person entitled to represent an intestate (or at any rate a deceased person who is not represented by an executor) or an "executor," *i.e.*, a person appointed by the will of a testator to represent him in respect of his property, and to deal with such property in accordance with the terms of the will. Thus, according to the usual terminology of English law, an "administrator," in the technical sense of the term, is opposed to an "executor." For the purposes of this Digest, however, it is convenient to make the term "administrator" include an executor,

(*b*) Land "in the legal signification comprehendeth any ground, soil, or earth whatsoever; as meadows, pastures, woods, moores, waters, marishes, furses and heath. It legally includeth also all castles, houses and other buildings: for castles, houses, &c., consist upon two things, viz., *land* or ground, as the foundation, and structure thereupon; so as passing the land or ground, the structure or building, thereupon passeth therewith." Co. Litt. 4 a; cited 1 Steph. Comm. (14th ed.), p. 93.

(*c*) Termed sometimes also "real estate" and "personal estate." See, *e.g.*, Exceptions 1 and 2 to Rule 195, *post*, where the language of the Wills Act, 1861 (24 & 25 Vict. c. 114), is followed.

and thus to give it a somewhat wider sense than it usually receives in English law books.

(3) *Personal representative*.—The term “personal representative” is here used in a very wide sense; it includes a person who, under any legal system, represents an intestate, or a testator, in regard to his property

As applied, however, to England, it is equivalent to an administrator in the sense given to that term in this Digest.

(5) *Administration*, (6) *Succession* (d).—The terms “administration” and “succession” are purposely so defined as to be applicable to foreign countries (*e.g.*, to France) no less than to England. The two things are essentially different, for the one means the dealing with a deceased person’s property according to law, the other the succeeding to it beneficially. And English law, in common with the systems which follow the law of England, emphasises the distinction between administration and beneficial succession.

“Administration” (e) means in England the dealing according to law with the property of an intestate, or testator, by the person who has authority under English law so to deal with it.

No one can fully represent the deceased, or has a right in all respects to deal with his property, *e.g.*, to distribute it, who has not obtained authority to do so from the Court (f). If the deceased dies intestate (g), the necessary authority is acquired by the proper person (*e.g.*, the intestate’s next of kin) obtaining from the Court a grant of letters of administration. If the deceased has made a will appointing an executor who consents to act, then the necessary authority is acquired by the executor obtaining from the Court

(d) Only those terms in Rule 75 are commented upon which need explanation.

(e) As to some ambiguities of the word “administration,” see language of Lord Selborne in *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 504.

(f) On the owner’s death, if he dies having made a will appointing an executor, his personal property, and also (if he dies on or after Jan. 1, 1898) his real property, vests in the executor (60 & 61 Vict. c. 65, s. 1 (1)). If he dies intestate, his personal property vests “in the judge of the Court of Probate [now the Probate Division of the High Court] for the time being” (21 & 22 Vict. c. 95, s. 19), by whom letters of administration are granted to some proper person. Real property also vests in the person to whom letters of administration are granted, but pending the grant the legal estate is apparently vested in the heir-at-law (see *John v. John*, [1898] 2 Ch. (C. A.) 573), who, however, has no power to deal with the property until it is duly conveyed to him by the administrator. See also p. 339, n. (m), *post*.

(g) Or, having made a will, has either appointed no executor, or has appointed an executor who declines to act.

probate of the will (*h*). The duty of an administrator, including in that term an executor, is, it should be here remarked, to pay the duties (*i*) and debts due from the property of the deceased intestate or testator, and, having done this, or, to use a popular expression, having "cleared" the estate, to hand over what remains to the person or persons entitled to succeed to it according to law.

"Succession" means the succeeding beneficially to the property of a deceased person, or, rather, to the distributable residue thereof, *i.e.*, to the portion which remains in the hands of the administrator after the estate has been cleared.

But, under English law, though administration is kept absolutely distinct from succession, there can be no succession to property without administration; for the possibility of dealing fully and legally with the property of an intestate or testator depends, as already pointed out, upon someone having obtained from the Court, in the form either of letters of administration or of probate, authority to deal with the property according to law, or, in other words, to administer it.

(7) *Grant*, (8) *English grant*.—The Court, as already pointed out, where the deceased person dies intestate, grants letters of administration, and, where he has made a will and appointed an executor who acts, grants probate. The word "grant," as used in these Rules, includes a grant of either kind. The expression "English grant," which is not a technical one, is used only for the

(*h*) See Williams, *Executors* (11th ed.), p. 201. There is, of course, the difference that the authority of an administrator, in the restricted sense of the term, depends strictly on his having obtained letters of administration, whilst the authority of an executor depends ultimately, not upon his having obtained probate, but upon his appointment under the will; the probate is rather the recognition of an executor's authority than the conferring of it. *Woolley v. Clark* (1822), 5 B. & Ald. 744; *Thompson v. Reynolds* (1827), 3 C. & P. 123. But this distinction is for our present purpose unimportant. No one, whether administrator or executor, can fully represent the deceased until he has obtained the authority or sanction of the Court by a grant, as the case may be, either of administration or of probate. See the Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11; *Johnson v. Warwick* (1856), 17 C. B. 516, 522; *Haas v. Atlas Assurance Co., Ltd.*, [1914] 2 K. B. 209. Note, too, the necessity for taking out probate, &c., under the Stamp Act, 1815 (55 Geo. III. c. 184), s. 37; and see 28 & 29 Vict. c. 104, s. 57; 44 Vict. c. 12, s. 40; *New York Breweries Co. v. Attorney-General*, [1899] A. C. 62.

(*i*) English executors of a testator domiciled in England are, to the extent of the assets in their hands, liable to pay English estate duty and settlement estate duty on foreign personalty, although this foreign personalty is expressly bequeathed to foreign executors and remains under their sole control. *Dun-cannon v. Manchester*, [1912] 1 Ch. 540.

sake of brevity, and to distinguish a grant made by the Court from a grant of administration or probate made by some foreign Court.

A grant is, in the usual course of things, made by the Court as the result of proceedings which are non-contentious, or, as they are technically called, in "common form" (*k*). But if the right to represent an intestate or testator is, or may be, disputed, it becomes the subject of an action, called a "probate action," and a grant is made by the Court as a result of such action (*l*).

(A) ADMINISTRATION.

RULE 76 (*m*).—The Court has jurisdiction to make a grant (*n*) in respect of the property (*o*) of a deceased person, either

(1) where such property is locally (*p*) situate in England at the time of his death, or

(*k*) See Tristram & Coote, Prob. Prac. (15th ed.), pp. 1—285.

(*l*) A "probate action" (see Ord. LXXI. r. 1) is either (i) an action for determining which of two claimants is entitled to a grant of letters of administration; or (ii) for proving wills in solemn form of law; or (iii) for the revocation of probates or letters of administration. Compare Tristram & Coote, pp. 363—369, where the term "probate action" is used in rather a narrower sense. A probate action, which was formerly brought in the Court of Probate, must now be brought in the Probate Division of the High Court.

(*m*) Tristram & Coote, Prob. Prac. (15th ed.), pp. 3—7, 350—353; *Preston v. Melville* (1840), 8 Cl. & F. 1; *Enohin v. Wylie* (1862), 10 H. L. C. 1; *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; *In Goods of Tucker* (1864), 3 Sw. & Tr. 585; 34 L. J. P. & M. 29; *In Goods of Coode* (1867), L. R. 1 P. & D. 449; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530; 2 Cl. & F. 84. Compare *In Goods of Fittock* (1863), 32 L. J. P. & M. 157; *In Goods of Lord Howden* (1874), 43 L. J. P. & M. 26; *In Goods of De la Saussaye* (1873), L. R. 3 P. & D. 42; *In Goods of Harris* (1870), L. R. 2 P. & D. 83; *In re Cocquerel*, [1918] P. 4; *In re De la Rue* (1890), 15 P. D. 185; *In re Seaman*, [1891] P. 253; *In re P. A. Fraser*, [1891] P. 285; *In re Tamplin*. [1894] P. 39; *Robinson v. Palmer*, [1901] 2 Ir. R. 489; *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A. C. 603, 609.

See the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, and Walker & Williams (5th ed.), pp. 41, 139. The Land Transfer Act, while not affecting the ultimate beneficial succession to real property, vests such property, with certain exceptions mentioned in sect. 1, sub-sect. (4), on the death of the deceased owner in his personal representative, as if it were a chattel real vesting in him, and gives to the personal representative (executor or administrator) the administration of such real estate. The Land Transfer Act, 1897, does not apply to Ireland or Scotland, nor, indeed, to any land outside England.

Notes (*n*), (*o*), (*p*), see next page.

(2) where such property has, or the proceeds thereof have, become locally situate in England at any time since his death, and not otherwise (*q*).

The locality of the deceased's property under this Rule is not affected by his domicil at the time of his death (*r*).

Comment.

The Court has jurisdiction to make a grant whenever the deceased dies leaving any property whatever situate in England, even if it be no more than his clothes. Hence, whenever a person dies in England, the Court has almost of necessity jurisdiction; the Court, again, has jurisdiction when property of the deceased comes into England after the date of his death; the foundation, in short, of the jurisdiction of the Court is that there is property of any

(*n*) The grants made by the Court, whether grants of letters of administration or grants of probate, are of different kinds. Thus the Court may make a general grant of administration where the deceased dies without having made any will at all, or a grant of administration *cum testamento annexo*, as where a person dies having made a will and has not appointed an executor who can and will act. So, again, the Court may admit the whole of a will to probate, or may admit part only of a testamentary document to probate and refuse it as to the rest, or may grant limited probate where the testator has limited the executor. Walker & Williams, chaps. v. to xi. These and other distinctions should be borne in mind. They do not, however, unless specially referred to, concern the Rules in this Digest. When a grant is mentioned therein, what is meant is, unless the contrary be stated, a general grant applying, as far as the English Courts can make it apply, to all the property of the deceased. As to the property which passes under an English grant, see chap. xi., Rule 87, p. 377, *post*.

(*o*) As to meaning of "property," see Rule 75, p. 335, *ante*.

(*p*) As contrasted with its being "constructively" or "fictitiously" situate in the country where the deceased dies domiciled, in accordance with the principle, *mobilia sequuntur personam*.

(*q*) But where a person who leaves no estate in England dies intestate residing and domiciled in a British colony, *e.g.*, Victoria, the Court may, for the convenience of the deceased's personal representatives who have obtained a colonial grant of administration, allow the grant to be resealed. *In Goods of Sanders*, [1900] P. 292.

In a probate action service of a writ of summons or notice of a writ of summons may be made in England; and, by leave of the Court or a judge, be allowed out of England. See Ord. XI. r. 3, *i.e.*, the jurisdiction of the Court is not restrained by legal inability to issue a writ for service out of England.

(*r*) *Attorney-General v. Hope* (1834), 1 O. M. & R. 530; 2 Cl. & F. 84; *Fernandes' Executors' Case* (1870), L. R. 5 Ch. 314; *In Goods of Ewing* (1881), 6 P. D. 19; *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468, 483.

kind of the deceased to be distributed within its jurisdiction (*s*), *i.e.*, in England. Nor, as regards the Court's jurisdiction, does it appear to make any difference that goods of the deceased which, at the time of his death or after his death, have been in England, have been subsequently removed; in such a case there would be a right of action against any person who wrongfully removed them. The exercise, however, of the Court's jurisdiction, is to a certain extent a matter of discretion (*t*).

Where, on the other hand, there is not or has not been in England any property (using that term in its very widest sense) of the deceased's, the Court has no jurisdiction (*u*) to make a grant.

"The foundation of the Court's jurisdiction being property of a deceased to be distributed in this country, administration will not be granted in respect merely of property abroad. It is a condition precedent to a grant that it should appear that the deceased left property in this country either real or personal" (*x*).

"A will disposing only of property in a foreign country is not entitled to probate; unless it confirms, or is confirmed by, the English will" (*y*).

"It is not," it has been laid down with reference to a particular case, "one of the functions of this Court to determine, as an abstract question, who is the proper representative of a deceased person, and if the Courts of France insist upon such a declaration they are very unreasonable. The foundation of the jurisdiction of this Court is, that there is personal property of the deceased to be distributed within its jurisdiction. In this case the deceased had no property within this country, and the Court has therefore no jurisdiction" (*z*).

Two points deserve special attention:—

(1) *As to property of the deceased*.—The property, the situa-

(*s*) *In Goods of Tucker* (1864), 3 Sw. & Tr. 585, 586; *Stubbings v. Clunies Ross* (1911), 27 T. L. R. 361.

(*t*) *In Goods of Ewing* (1881), 6 P. D. 19.

(*u*) See, for what may possibly be considered an exception to the rule that the Court has no jurisdiction where there is no property in England, p. 343, note (*h*), *post*; and compare *Tristram & Coote*, pp. 37—40. Notice, generally, the statements as to the local situation of personal property, pp. 342—347, *post*.

(*x*) *Walker & Williams* (5th ed.), p. 41; and see *Land Transfer Act, 1897*, s. 1, sub-s. 3.

(*y*) *Walker & Williams*, p. 29; *In Goods of Lord Howden* (1874), 43 L. J. P. & M. 26; *In Goods of Lockhart* (1893), 69 L. T. 21.

(*z*) *In Goods of Tucker* (1864), 3 Sw. & Tr. 585, 586, judgment of Sir J. P. Wilde.

tion of which in England gives the Court jurisdiction, must be property as defined in Rule 75 (a).

The property, further, must be situate in England, in the character of property of the deceased, or at any rate of property to which the administrator under an English grant has a claim. The Court will not derive jurisdiction from the mere fact that property in a foreign country, which did belong to the deceased at the time of his death, but has there since his death become lawfully the property of another, comes into England (b).

(2) *As to the "situation" of property.*—In most instances the situation of property, *i.e.*, whether it is or is not situate in England, does not admit of doubt; but it sometimes happens that there is a real difficulty in affixing to property, especially where it consists of debts or other *choses in action* (c), its due local position. In the determination of the locality properly assignable to the different kinds of personalty which have been owned by a testator or intestate, the High Court is in the main guided by maxims (modified in some instances by statute) derived from the practice of those ecclesiastical tribunals whose jurisdiction in "matters and causes testamentary," to use a convenient expression taken from the Probate Act, 1857, has ultimately passed to the High Court (d). These maxims, as modified by statutory enactments, are based on two considerations: the first is, that property, so far as it consists of tangible things, must in general be held situate at the place where at a given moment it actually lies; the second is, that property may in some instances, and especially where it consists of debts or choses in action, be held to be situate at the place where it can be effectively dealt with. From these two considerations flows the following general maxim, *viz.*, *that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.* Thus English lands,

(a) See p. 335, *ante*.

(b) See chap. xi., Rule 87, *post*; chap. xviii., Rule 131, *post*; and chap. xxiv., Rule 152, *post*.

(c) See pp. 75, 77, *ante*.

(d) Under the Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 1, 3, 4, 23, taken together with the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16.

whether freehold or leasehold, are situate in England; and so goods, lying in a warehouse in England, are to be held situate in England, and debts due from debtors resident in England are also to be held there situate; French lands, on the other hand,—goods in French warehouses, and, in general, debts due from debtors resident in France,—are to be held situate in France (*e*).

But the considerations on which our general maxim is grounded introduce some real or apparent exceptions to its operation.

Any British ship, for example, belonging to a deceased person, which is registered at any port of the United Kingdom, is to be held, for some purposes at any rate, to be situate at that port (*f*): so goods on the high seas which are capable of being dealt with in England by means of bills of lading in this country are, wherever actually situate, to be held situate in England (*g*); and goods which at the death of the deceased owner are *in transitu* to this country, and arrive here after his death, are apparently to be held situate in England at his death (*h*).

(*e*) As to the locality of a simple contract debt, see *Attorney-General v. Higgins* (1857), 2 H. & N. 339, 348; and *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, 192, judgment of Abinger, C. B.; *In re Maudslay, Sons & Field*, [1900] 1 Ch. 602; *Payne v. Rex*, [1902] A. C. 552. "The locality of a mortgage debt is regulated by the same rules that apply to other debts, and in "no way depends on the situation of the property comprised therein." Hanson (6th ed.), p. 109. This statement is quite consistent with *Sudeley v. Attorney-General*, [1897] A. C. 11, and *In re Smyth*, [1898] 1 Ch. 89, but must be taken subject to two reservations:—(1) A mortgage debt must be generally a specialty debt, and in cases not coming within the Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39, *i.e.*, where the debt is due from a debtor in the United Kingdom, a specialty debt is situate where the mortgage deed happens to be at the date of the death of the creditor. Conf. p. 345, *post*; and see, especially, Hanson (6th ed.), p. 108. If, however, the original deed is preserved in a land registry, the debt is situate there, irrespective of the place in which a duplicate is situate. *Toronto General Trusts Corporation v. The King*, [1919] A. C. 679. (2) Where an English creditor dies possessed of debts secured by foreign mortgages, *e.g.*, of land in France, then if under French law the debt so secured is treated as an immovable, it would (*semble*) be held by an English Court to be immovable property situate out of England. See *Lawson v. Commrs. of Inland Revenue*, [1896] 2 Ir. R. 418, 435, judgment of Pallets, C. B.; and compare *In re Fitzgerald*, [1904] 1 Ch. (O. A.) 573, 583, 584, 588; *Winans v. Attorney-General* (No. 2), [1910] A. C. 27.

(*f*) See 27 & 28 Vict. c. 56, ss. 4, 5.

(*g*) *Attorney-General v. Hope* (1834), 1 C. M. & R. 530.

(*h*) *Attorney-General v. Pratt* (1874), L. R. 9 Ex. 140; *Wyckoff's Case* (1862), 3 Sw. & Tr. 20; 32 L. J. P. & M. 214.

Under this head may be brought the exceptional cases in which the Court, though there is no property of the deceased strictly situate in England, will make a grant on the ground that he has left property in a foreign country,

When bonds, again, or other securities, *e.g.*, bills of exchange, forming part of the property of a deceased person, are in fact in England and are marketable securities in England, saleable and transferable there by delivery only, without its being necessary to do any act out of England in order to render the transfer valid, not only the bonds or bills themselves, but also, what is a different matter, the debts or money due upon such bonds or bills, are to be held situate in England, and this though the debts or money are owing from foreigners out of England (*i*). The reason manifestly is that the bonds or bills, though they may from one point of view be looked upon as mere evidence of debts which, being due from persons resident abroad, should be considered situate in a foreign country, are in reality chattels of which the representative of the deceased owner can obtain the full value in England, and this without doing any act in a foreign country. Such bonds differ essentially from any foreign stock which cannot be fully transferred by the representative of the deceased without doing some act in a foreign country. The certificates or other documents, if any, held by the owner of such stock, may be in England, but they are mere evidence of a debt due from a foreign government, or, in other words, from a debtor not resident in England, and this debt, *i.e.*, the stock, must apparently be held to be situate out of England (*k*).

Owing to the view held by the ecclesiastical tribunals that a debt due on a deed or other specialty was to be considered as situate, not where the debtor resided, but at the place where the deed itself was situate (*l*), and the modification of this doctrine

e.g., money at a bank in Canada, which would be remitted to England by the banker, on a personal representative being constituted in England. The money is in this case virtually *in transitu*.

See Story, ss. 519, 520, for a suggestion that ships and cargoes which, though in fact in England, are on the point of returning to the country, *e.g.*, New York, where their owner dies domiciled, should be treated as situate in New York at the time of the owner's death.

(*i*) *Attorney-General v. Bouwens* (1838), 4 M. & W. 171; *Winans v. The King*, [1908] 1 K. B. (C. A.) 1022. A certificate of shares in a foreign company on which a form of transfer and power of attorney have been indorsed and executed, and which are marketable in England, is property situate there and liable to probate duty. *Stern v. Reg.*, [1893] 1 Q. B. 211. Compare *In re Clark, McKecknie v. Clark*, [1898] 1 Ch. 294; *In Goods of Agnese*, [1900] P. 60.

(*k*) Compare *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, 192, 193, with *Attorney-General v. Dimond* (1831), 1 C. & J. 356; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530.

(*l*) See *Commissioner of Stamps v. Hope*, [1891] A. C. 476; *Gurney v.*

by a statutory enactment (*m*), the rules as to the situation of such a debt are anomalous. A debt due on a deed situate in England from a debtor resident abroad (*n*), and also a debt due on a deed situate abroad from a debtor resident in England (*o*), must each be held situate in England. A debt due on a deed situate abroad from a debtor resident abroad is, like any other debt due from such debtor, to be held situate out of England (*p*).

It was, further, long ago "established by law that judgment debts were assets, for the purposes of jurisdiction, where the judgment is recorded" (*q*); and this rule, though it sounds technical, is in substantial conformity with the principle regulating the locality of debts, for a judgment debt is enforceable by execution, or some similar process, in the country where the judgment is recorded (*r*).

A share, lastly, in a partnership business is to be held situate, not where the surviving partners reside, but where the business is carried on. "The share of a deceased partner in a partnership asset," it has been laid down by Sir James Hannen, "is situate where the business is carried on" (*s*), and this view has been followed by the House of Lords (*t*).

Rawlins (1836), 2 M. & W. 87. See, however, *Toronto General Trusts Corporation v. The King*, [1919] A. C. 679, p. 343, *ante*.

(*m*) See Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39. "For the purposes of the stamp duties on probates of wills and letters of administration, debts and sums of money due and owing from persons in the United Kingdom to any deceased person at the time of his death on obligation or other specialty, shall be estate and effects of the deceased within the jurisdiction of Her Majesty's Court of Probate in England or Ireland, as the case may be, in which the same would be if they were debts owing to the deceased upon simple contract, without regard to the place where the obligation or specialty shall be at the time of the death of the deceased." Hanson (6th ed.), p. 108. Compare as to specialty debts, *Payne v. R.*, [1902] A. C. 553, which shows that probate duty may be exigible in respect of a debt in one country as a simple contract debt, and in another as a specialty debt, if it is secured by a mortgage on property there.

(*n*) *Commissioner of Stamps v. Hope*, [1891] A. C. 476.

(*o*) Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39.

(*p*) See pp. 342, 343, *ante*, and *Winans v. Att.-Gen.* (No. 2), [1910] A. C. 27.

(*q*) *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, 191, judgment of Abinger, C. B.

(*r*) A debt due on a foreign, e.g., a French, judgment, is not indeed in strictness a judgment debt (*Dupleix v. De Roven* (1705), 2 Vern. 540), but it is nevertheless recoverable in the country where the judgment is obtained.

(*s*) *In Goods of Ewing* (1881), 6 P. D. 19, 23. Compare, however, *Attorney-General v. Sudeley*, [1895] 2 Q. B. 526, 530, judgment of Russell, L. C. J.

(*t*) *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468; see *Beaver v. Master*

Most of the reported decisions and of the enactments with regard to the local situation of a deceased person's personality have immediate reference, not to jurisdiction, but to the liability of the deceased's property to the payment of probate duty (*u*). The two matters, however, are closely connected. The jurisdiction of the High Court in matters testamentary depends on there being property of the deceased situate within the limits of a district in England over which an ecclesiastical Court used to exercise jurisdiction, and probate duty, whilst it existed (*x*), was imposed only on such personal property of the deceased as at the time of his death was situate within such limits (*y*). Hence where, under any decision or statute, it can be shown that any property of a deceased person would, if probate duty now existed, be liable to such duty, it follows that such property is so situate in

in Equity of Victoria, [1895] A. C. 251; *Commissioner of Stamp Duties v. Salting*, [1907] A. C. 449. A share in an English company is locally situate in England, and liable to estate duty. *New York Breweries Co. v. Attorney-General*, [1899] A. C. 62. This applies also to shares of such a company registered in a colonial register if the owner dies domiciled in the United Kingdom. Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 36 (b). As to patents, see *Smelting Co. of Australia v. Commissioners of Inland Revenue*, [1897] 1 Q. B. (C. A.) 175. A share in an undivided trust estate is situate where the trustees reside. *Sudeley v. Attorney-General*, [1897] A. C. 11; *In re Smyth*, [1898] 1 Ch. 89; compare *Kelly v. Selwyn*, [1905] 2 Ch. 117. As to the goodwill of a business, see *Muller & Co.'s Margarine, Ltd. v. Commissioners of Inland Revenue*, [1901] A. C. 217.

(*u*) See *Attorney-General v. Bouwens* (1838), 4 M. & W. 171, 191, 192, judgment of Abinger, C. B.; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530, especially pp. 560, 561, language of Lord Brougham, and compare 22 & 23 Vict. c. 36; 25 & 26 Vict. c. 22; 27 & 28 Vict. c. 56. The technical and somewhat artificial distinctions as to the situation of personal property in reference to the incidence of probate duty may still occasionally be of importance in reference to the incidence of estate duty. See Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 2, and s. 8, sub-s. 1.

(*x*) It is for all practical purposes abolished as regards property passing on the death of a person dying after 1st August, 1894. See the Finance Act, 1894, s. 1, and First Schedule.

(*y*) *I.e.*, in so far as the duty fell on *English* property. Probate duty fell on property situate in other parts of the United Kingdom, but all reference to it as a tax on movable or personal property in Scotland or Ireland is here purposely omitted. The English cases refer to duty payable in respect of property alleged to be situate in England, and therefore in these cases the decision that property is or is not liable to probate duty is a decision that it is or is not situate in England. The principles, however, for determining its locality were the same whatever was the part of the United Kingdom in which it was alleged to be situate. Hence a Scottish decision, such as *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468, gives us guidance in deciding whether given property is or is not situate in England.

England as to give the Court jurisdiction to make a grant. The inference, however, must not be drawn that, because no personal property of the deceased would be liable to the payment of probate duty if such duty still existed, therefore there is nothing belonging to the deceased so situate in England as to give the Court jurisdiction to make a grant; and this for two reasons. The first is, that probate duty was chargeable only on property situate in England at the time of the deceased's death. The second is, that the character of the thing or the property, on the situation whereof liability to probate duty depended, is not always exactly the same as the character of the thing or property on the situation whereof the jurisdiction of the ecclesiastical Courts depended, and the jurisdiction of the High Court still depends. The liability to duty used to depend on the situation in England of a thing of some pecuniary value on which the tax could operate, *e.g.*, a debt owing to the deceased. The jurisdiction of the Court depends on there being in England some thing—if the word “thing” be used in a very wide sense—for the dealing with which the representative of the deceased requires a grant. These two things may, but they may not, coincide. Thus the deceased dies in France and leaves debts due to him from Frenchmen living in France. The only things he has left in England are letters, of a merely nominal value in themselves, but needed by his representatives as evidence of the French debts; the holder of the letters will not give them up to any one who has not constituted himself in England the representative of the deceased. Under these circumstances there is no property of the deceased in England which would have been liable to probate duty, but there is property of the deceased, *viz.*, the letters, to which the representative of the deceased has a right, and the presence of which in England gives the Court jurisdiction to make a grant.

Domicil.—The fiction embodied in the often misleading maxim, *mobilia sequuntur personam*, under which the movables of a deceased person are for some purposes (*z*) regarded as situate in the country where he has his domicile at the time of his death, has no application to the local situation of personal property as regards the jurisdiction of the Court to make a grant (*a*).

(*z*) *E.g.*, the distribution of, and the beneficial succession to, an intestate's movables (see chap. xxxi., *post*), or the determination of the liability of a deceased person's movables to legacy duty.

(*a*) See p. 339, *ante*. For a contrary view, see Browne, Prob. Prac. (2nd ed.), p. 143, where it appears to be stated that the Court has jurisdiction to grant

Illustrations.

1. *T* (*b*), a Frenchman, dies domiciled in France. He is owner of freeholds in England. The Court has jurisdiction (*c*).

2. *T*, a Frenchman domiciled in France, dies in France leaving goods in England and book debts due to him from *X*, a Frenchman residing in England (*d*). The Court has jurisdiction.

3. *T* dies in Australia leaving money due to him from an incorporated banking company having its head office in London (*e*). The Court has jurisdiction.

4. *T* dies in France. *X*, who resides in England, owes *T* 100*l*. on a bond which is in France. The Court has jurisdiction (*f*).

5. *T* dies in France. *X*, who resides in France, owes *T* a debt under a deed which is situate in England. The Court (*semble*) has jurisdiction (*g*).

probate whenever a person dies domiciled in England. This opinion derives some apparent countenance from *Spratt v. Harris* (1833), 4 Hagg. Ecc. 405; *In re Winter* (1861), 30 L. J. P. & M. 56, but is inconsistent with *Attorney-General v. Hope* (1834), 1 C. M. & R. 530; 2 Cl. & F. 84; *In Goods of Fittock* (1863), 32 L. J. P. & M. 157; *In Goods of Coode* (1867), L. R. 1 P. & D. 449, and generally with the well-established principle that "probate duty attaches to *bona notabilia* in the place where the goods are situate, wholly "irrespective of the question of the domicil of the testator." *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468, 483, language of Herschell, L. C. See *In Goods of Ewing* (1881), 6 P. D. 19, 23, judgment of Sir J. Hannen; *Fernandes' Executors' Case* (1870), L. R. 5 Ch. 314, 317, judgment of Giffard, L. J.

(*b*) "*T*" in the illustrations to this Rule stands for testator, but for the purpose of the Rule it makes no difference whether the deceased died testate or intestate. In each of these illustrations it is to be assumed that there was no other property of the deceased in England than that mentioned in the illustration.

(*c*) See the Land Transfer Act, 1897, s. 1.

(*d*) *Preston v. Lord Melville* (1840), 8 Cl. & F. 1; *Enohin v. Wylie* (1862), 10 H. L. C. 1; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34.

(*e*) The company resides legally where it has its head office. (See Rule 19, pp. 163, 164, *ante*.) Hence there is a debt due to the deceased from a debtor resident in England. "Property which consists of shares in or claims upon "any company or society, is locally situate where the company has its head office." Hanson (8th ed.), p. 110. Compare *Attorney-General v. Higgins* (1857), 2 H. & N. 339; and *Fernandes' Executors' Case* (1870), L. R. 5 Ch. 314.

(*f*) This is the apparent result of the Revenue Act, 1862 (25 & 26 Vict. c. 22), s. 39. This enactment (*semble*) takes specialty debts due from persons in the United Kingdom out of the operation of the exceptional rule that a specialty debt is situate where the deed is situate.

(*g*) *Commissioner of Stamps v. Hope*, [1891] A. C. 476, 481, judgment of P. C. delivered by Lord Field, where the rule as to the situation of specialty debts is explained. Compare, however, *Toronto General Trusts Corporation v. The King*, [1919] A. C. 679, p. 343, *ante*.

6. *T* dies in Paris. Before his death he has purchased at New Orleans a cargo of cotton. At the time of his death it is on the high seas on board an American ship, and bills of lading under which the cotton can be disposed of are in London in the hands of *T*'s broker. The Court has jurisdiction (*h*).

7. *T*, a British subject, dies in France. He is owner of a British ship registered at the port of Liverpool. She is, at the time of *T*'s death, at New York. The Court (*semble*) has jurisdiction (*i*).

8. *T* dies domiciled in France. Two months after his death, goods purchased by him in the United States, and ordered by him to be sent to London, arrive at the house in London where he had ordered them to be sent. His personal representative, under French law, applies for a grant. The Court has jurisdiction (*k*).

9. *T* is a member of a partnership carrying on business in England, and is entitled to a share in the partnership assets; he dies abroad domiciled in France. The Court has jurisdiction (*l*).

10. *T*, an Englishman resident in France, dies there, having by his will appointed *A* his executor. *T* leaves at the moment of his death jewels worth 1,000*l.* in England. *T*'s son, an Englishman, who also resides in France, is at the moment of *T*'s death in England. He takes possession of the jewels and returns with them to his home in France. After the removal of the jewels *A* applies for a grant of probate. The Court has jurisdiction (*m*).

11. The wife of an Englishman residing and domiciled in England is separated from him and living in France. She dies there intestate, leaving movables in France, but leaving no property in England. The husband cannot establish his claim in France to her property without an English grant. The Court has (*semble*) no jurisdiction to make a grant (*n*).

(*h*) And this for two reasons. The cotton itself is to be considered as situate in England because it can be dealt with there. (See Hanson (6th ed.), p. 110, and compare *Attorney-General v. Hope* (1834), 1 C. M. & R. 530; *Attorney-General v. Pratt* (1874), L. R. 9 Ex. 140; *Wyckoff's Case* (1862), 3 Sw. & Tr. 20.) The bills of lading are actually in England, and this would give the Court jurisdiction. Compare as to bills of exchange, &c., *Attorney-General v. Bouvens* (1838), 4 M. & W. 171; *Inglis v. Robertson*, [1898] A. C. 616, 626, 627.

(*i*) See Revenue Act, No. 2, 1864 (27 & 28 Vict. c. 56), s. 4.

(*k*) See pp. 343, 344, *ante*.

(*l*) Compare *In Goods of Ewing* (1881), 6 P. D. 19, 23, judgment of Sir Jas. Hannen; and *Laidlay v. Lord Advocate* (1890), 15 App. Cas. 468.

(*m*) See pp. 339, 340, *ante*.

(*n*) See *In Goods of Tucker* (1864), 3 Sw. & Tr. 585; and compare passage from judgment of Sir J. P. Wilde, cited p. 341, *ante*. Note that the wife is

12. *T* dies abroad domiciled in England. By his will he has appointed *A* his executor. He leaves money in a bank at Chili and goods in warehouses in France. *A* applies for a grant of probate. The Court has no jurisdiction (*o*).

13. *T* dies domiciled in England, but resident in New Zealand. He is at his death possessed of large sums of money invested on mortgages of real estate in New Zealand. The mortgagors are resident, and the mortgage deeds are in New Zealand. *T* bequeaths the whole of his property to his wife who is resident in England. The Court (*semble*) has no jurisdiction (*p*).

(B) SUCCESSION.

RULE 77 (*q*).—Where the Court has no jurisdiction to make a grant (*r*), the Court has no jurisdiction with regard to the succession to the property of a deceased person.

Comment.

English Courts will not discuss, and have no jurisdiction to adjudicate upon, the claim of any man to succeed beneficially to, or indeed to derive any benefit from, the property of a deceased person, unless there is before the Court some person authorized under an English grant (*s*) to deal with such property, and in

at the time of her death domiciled in England. See p. 134, *ante*; and conf. *Dolphin v. Robins* (1859), 7 H. L. C. 390; *Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146.

(*o*) See *In Goods of Coodo* (1867), L. R. 1 P. & D. 449.

(*p*) Compare *Sudeley v. Attorney-General*, [1897] A. C. 11. "It will be observed that in this case the freedom from duty of the husband's estate in respect of the New Zealand mortgages was admitted by the Crown; but, although it is not so stated in the report of the case, the reason, no doubt, was that the mortgage deeds were in New Zealand at the date of the death of the husband, and the locality of the specialty debt would therefore be New Zealand, for a specialty debt is situate where the specialty is found at the time of the creditor's death (*Commissioner of Stamps v. Hope*, [1891] A. O. 476)." Hanson (6th ed.), p. 108. See p. 343, *ante*.

(*q*) See *Attorney-General v. Hope* (1834), 1 C. M. & R. 530, and especially p. 540, language of Brougham, L. C., and pp. 562—564 (note).

(*r*) See, for meaning of "grant," p. 338, *ante*; and see also, as to where Court has no jurisdiction to make a grant, Rule 76, p. 339, *ante*.

(*s*) See p. 338, *ante*. For an exception to this rule in the case of insurance policies of persons domiciled abroad, see the Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11, as amended by the Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19; *Haas v. Atlas Assurance Co., Ltd.*, [1914] 2 K. B. 209.

respect thereof to represent the deceased. Even the representative under the law of a foreign country of a foreigner who dies domiciled abroad has no *locus standi* (*t*) before an English Court until he has obtained an English grant (*u*).

The validity, indeed, of a will—a matter which affects succession—can be decided, and indeed can be decided only, in an action of which the object is to determine a person's claim to an English grant, *i.e.*, in a probate action. But this fact in no way invalidates Rule 77. A probate action involves or implies the authority of the Court to make a grant.

Illustrations.

1. The deceased, domiciled in England, has died in France intestate, leaving goods and money in France, but leaving no property of any kind in England. *A* claims the intestate's property as his next of kin. The Court has no jurisdiction to determine whether *A* is entitled to succeed to the property (*x*).

2. *T* dies domiciled in England. By his will, made in accordance with the English Wills Act, he appoints *X* his executor. *T* leaves no property whatever in England. He leaves goods and money in France and in Germany. *A* claims a legacy of 10,000*l.* under *T*'s will. The Court has no jurisdiction to determine whether *A* is entitled to the legacy (*y*).

RULE 78.—Where the Court has jurisdiction (*z*) to make a grant, the Court has, in general, jurisdiction to determine any question with regard to the succession to the assets of a deceased person.

Comment.

The jurisdiction of the Court is in no way restricted to dealing with the property the presence of which in England gives it

(*t*) Compare Williams (11th ed.), p. 263; *Attorney-General v. Hope* (1834), 1 C. M. & R. 530, 540, 562—564.

(*u*) As to extension of an Irish grant, of a Scottish grant, or of a Colonial or Indian grant to England, see chap. xviii., Rules 133—135, pp. 495—497, *post*.

(*x*) Compare *In Goods of Tucker* (1864), 34 L. J. P. & M. 29; 3 Sw. & Tr. 585.

(*y*) Compare *In Goods of Coode* (1867), L. R. 1 P. & D. 449.

(*z*) As to where the Court has jurisdiction to make a grant, see Rule 76, p. 339, *ante*. But this must be taken subject to Rule 53, clause 1 (p. 223, *ante*), that the Court has no jurisdiction to determine the title to, or the right to the possession of, foreign land.

authority to make a grant. Where jurisdiction to make a grant exists, the Court has (in general) jurisdiction (*a*) to determine every question whatever connected with succession to movables, and to provide for the succession to the assets of the deceased, or rather to the distributable residue thereof. With regard to such distributable residue the Court, for example, has authority to decide whether the will or alleged will of the deceased is a valid testamentary disposition (*b*), what is the construction or effect of the will (*c*), who are the persons entitled to succeed to the movable property of an intestate (*d*), and the like, and generally to provide for the due succession to the assets of the deceased.

The words "in general" in our Rule point out that the jurisdiction of the Court under that Rule is not absolutely unrestricted. The Court's jurisdiction is exercised, generally speaking, on an administration action (*e*) being brought by some one, *e.g.*, a legatee, or next of kin, interested in the distribution of a deceased testator or intestate's estate, for the purpose of having the estate administered by the Court. For the maintenance of such an action, it is necessary that the personal representative, who has obtained an English grant, should be made a party to it, for "an estate cannot be administered . . . in the absence of a personal representative. And, consequently, if it appear that the Court cannot give the plaintiff the relief which he asks without an administration of the estate, there must be a personal representative of it before the Court" (*f*); and "in cases where the executor

(*a*) Whether the jurisdiction is exercised in a probate action brought in the Probate Division of the High Court, or in an administration action brought in the Chancery Division of the High Court, is for the purpose of these Rules immaterial. It is in either case equally the jurisdiction of the High Court. Note, further, the extremely wide jurisdiction of the Court, when it has before it representatives of the deceased, to administer in an administration action the whole property of the deceased as far as lies within the power of the Court. See *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; (1885), 10 App. Cas. 453.

(*b*) *Bremer v. Freeman* (1857), 10 Moore, P. C. 306.

(*c*) *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402.

(*d*) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

(*e*) See as to an administration action, 2 Williams, *Executors* (11th ed.), p. 1620, and following; and see as to proceedings on an originating summons, R. S. C. Ord. LV. rr. 3—14, and note that an originating summons could not formerly be served out of England. 2 Williams, *Executors* (11th ed.), p. 1525, note (*g*); *In re Busfield* (1886), 32 Ch. D. (C. A.) 123. But leave can now be obtained under Ord. XI. r. 8a, which, as altered in 1920, is applicable to Scotland or Ireland (contrast *In re Campbell*, [1920] 1 Ch. 35, decided under the older form of the rule), on the same conditions as prescribed in Ord. XI. r. 1 (see Rule 60, pp. 250, 252, *ante*).

(*f*) 2 Williams, *Executors*, pp. 1628, 1629.

"or administrator is required to be made a party, it is not sufficient that he is such by the appointment and authority of a foreign government; but he must obtain his right to represent the estate from the Probate Court in this country" (*g*).

But this action, like every other, commences with the issue of a writ, which must be served upon the personal representative, or, using the word "administrator" in a wide sense, upon the administrator. And any restriction on the service of the writ is, as we have already pointed out (*h*), a restriction on the exercise of the Court's jurisdiction. When the administrator is in England, the Court has jurisdiction to entertain the action, for it is always possible for the administrator to be served with the writ. When the administrator is not in England, the rule still is that he cannot be served with the writ, and therefore that the Court has no jurisdiction to entertain an action against him (*i*). To this rule the exceptions are, it is true, extremely wide. Whenever an action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled in England (*k*), the Court has jurisdiction to allow service of a writ, and, therefore to entertain an action against the administrator though he is out of England; so, again, the Court has jurisdiction to entertain an administration action against an administrator who is out of England in any of the exceptional cases, in so far as they can possibly be applicable to such an action, in which the Court has jurisdiction to entertain an action *in personam* against a defendant who is out of England (*l*). But, wide as are the exceptions to the principle that the Court has no jurisdiction to entertain an administration action against an administrator who is not in England, they do not apparently cover every case which can arise (*m*).

Illustrations.

1. *T*, a Frenchman domiciled in England, dies there, leaving a house, of which he is tenant for years, household furniture, and

(*g*) *Ibid.* p. 1650; cf. p. 264.

(*h*) See pp. 242, 250, *ante*.

(*i*) See *In re Eager* (1882), 22 Ch. D. (C. A.) 86, which is not inconsistent with *In re Lane* (1886), 55 L. T. 149, where (*semble*) service was allowed under Ord. XI. r. 1 (*g*).

(*k*) Ord. XI. r. 1 (*d*). The words in the rule of Court are not "in England," but "within the jurisdiction." Compare p. 261 and p. 254, note (*n*), *ante*.

(*l*) See Exceptions 1 to 9 (pp. 254—271, *ante*) to Rule 60, p. 250, *ante*.

(*m*) See *Wood v. Middleton*, [1897] 1 Ch. 151.

other goods in England. *T* leaves a will, the construction of which is doubtful. The Court has jurisdiction to determine whether the will is valid, and who are the persons entitled beneficially to *T*'s property under the will (*n*).

2. *N*, a Frenchman domiciled in England, dies in France intestate, leaving in England leasehold property, household furniture, and stock in trade. The Court has jurisdiction to determine who are the persons beneficially entitled to *N*'s property (*o*).

3. *T* dies domiciled in Russia, leaving money in the English funds. Under a will made in the form required by Russian law, *T* appoints *X* his executor. *X* is recognised as *T*'s executor by the Russian Courts, and consequently the will can be proved here by him. A question arises under *T*'s will whether *T* did or did not die intestate as to his English property. The Court has jurisdiction to determine the construction of *T*'s will, and to divide *T*'s property in England among the persons who, on a right construction of the will, are beneficially entitled to it; but as a general rule the Court, having granted probate to *X*, will leave the persons claiming succession to *T*'s personal property to enforce their rights before the Russian tribunals (*p*).

4. *N*, domiciled in New York, dies there intestate, leaving goods and lands in New York, and money and stock in trade in England. *A* obtains letters of administration in New York. *B*, in England, claims to be entitled to the whole of *N*'s movable property as next of kin. *A*, as the representative of *N* under the law of *N*'s domicile, claims to have *N*'s movable estate in England handed over to him. The Court has jurisdiction to determine what are the rights of *B*, but will, in general, grant administration to *A*, and leave *B* to enforce his rights (if any) before the Courts of New York (*q*).

(*n*) Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1; *In re Bonnefoi, Surrey v. Perrin*, [1912] P. (C. A.) 233.

(*o*) *Re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *Doucet v. Geoghegan* (1878), 9 Ch. D. (C. A.) 441.

(*p*) Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402, 409; *In re Bonnefoi, Surrey v. Perrin*, [1912] P. (C. A.) 233. Compare, however, *Eames v. Hacon* (1880), 16 Ch. D. 407, 409; (1881) 18 Ch. D. (C. A.) 347.

(*q*) See *Enohin v. Wylie* (1862), 10 H. L. C. 1. That case refers to the construction of a will; but there is, in principle no distinction as regards the jurisdiction of the Court between the rules applicable to testamentary and those applicable to intestate succession.

CHAPTER X.

STAYING ACTION (a)—*LIS ALIBI PENDENS*.

RULE 79.—The Court has jurisdiction to interfere, whenever there is vexation and oppression, to prevent the administration of justice being perverted for an unjust end, and for this purpose to stay or dismiss an action or other proceeding.

But this jurisdiction will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious and oppressive (b).

Comment.

The Court has a very wide jurisdiction to prevent the abuse of its process, and, by staying an action or otherwise, for example, by restraining proceedings in a foreign Court, to hinder vexation or oppression. What is vexatious or oppressive, and whether the administration of justice is being perverted for an unjust end or not, is a matter in each case for the decision of the Court, in accordance with the circumstances of the particular case.

"I agree," says Bowen, L. J., "that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere, whenever there is vexation and

(a) *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 408, judgment of Bowen, L. J.; *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch. D. (C. A.) 225, 232, judgment of Lindley, L. J.; and p. 233, judgment of Bowen, L. J. Compare *Limerick Corporation v. Crompton*, [1910] 2 Ir. R. (C. A.) 416; *The Hagen*, [1908] P. 189.

(b) *The Christiansborg* (1885), 10 P. D. (C. A.) 141, 155; *Cohen v. Rothfeld*, [1919] 1 K. B. (C. A.) 410; *Hay v. Jackson & Co.*, [1911] S. C. 876. See also *Law v. Garrett* (1878), 8 Ch. D. (C. A.) 26; *The Peshawur* (1883), 8 P. D. 32; *The Manar*, [1903] P. 95.

"oppression, to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case. . . . The kind of jurisdiction which the Court exercises over litigation is, as I have said, to prevent what is vexatious and an abuse of its own process. There are many classes of cases in which the Court acts on that principle, which I will not attempt now to enumerate" (c).

These cases may, of course, have nothing to do with the conflict of laws, or with the fact that a cause of action or ground of defence arises in a foreign country. Still, the cases in which a party to an action applies to have it stayed or dismissed are very often, in some way or other, connected with transactions taking place in a foreign country. The exercise of jurisdiction to stay or dismiss an action is obviously discretionary, and will be exercised only when it clearly prevents the exercise under legal forms of vexation or oppression.

Illustrations.

1. *A*, a Scotsman, is domiciled in Scotland. He brings an action in respect of a cause of action arising wholly in Scotland against *W & Co.*, a company whereof the head office is in Scotland, though it has a branch office in England, *X*, who is resident in Scotland, *Y*, a director resident in Scotland, who does not appear, *Z*, a director resident in London, but also an uncertified bankrupt. The decision of the case depends wholly upon Scottish law, and mainly upon the evidence of persons resident in Scotland. The Court has jurisdiction to stay, and stays the action (*d*).

2. *A* is the wife of an American domiciled in British India. In 1902 a deed of separation is executed between *A* and her husband, under which he covenants to pay *A* a certain allowance. *X*, a solicitor, practising in Madras, is a trustee under the separation deed. *A*'s husband makes default in payment of the allowance, and *X*, as alleged by *A*, wilfully and negligently neglects to take proceedings against *X*, whereby *A* is unable to recover the money due by way of allowance from her husband. While *A* and

(c) *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 407, 408, judgment of Bowen, L. J.; compare *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch. D. (C. A.) 225.

(d) *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141. Contrast *In re Bonnefoi, Surrey v. Perrin*, [1912] P. (C. A.) 233, in which the Court refused to stay proceedings, the point involved being the interpretation of a holograph will in English of a domiciled Italian.

X are each temporarily resident in England, *A* brings an action against *X* for negligence, and *X* is, whilst in England, served with a writ. Since the issue of the writ *A* has left England for America, and *X* has returned to India. The Court, on an application on *X*'s behalf, dismisses the action (*e*).

3. *W*, the wife of *H*, an officer in the Indian army, stationed in Bombay, goes to England. Within two months *H* takes proceedings in the Bombay Court against *W* for divorce. Two days after the petition is served upon her in England, *W* begins a suit against *H*, who is then in England on short leave, for restitution of conjugal rights. *H* applies to the Court to stay proceedings in *W*'s suit till the determination of the proceedings by *H* in Bombay. The Court refuses to stay *W*'s proceedings (*f*).

4. *A* and *B* reside in Honduras. *X* and *Y* are partners, and carried on business under the name of *G & Co.* in London. They are resident in England. *A*, *B* and *X* had carried on business as partners in Honduras. The London firm are agents of the Honduras firm. On the dissolution of the Honduras partnership *X* obtains a decree in Honduras for taking partnership accounts. Before the accounts are taken *A* and *B* bring an action in England against *X* and *Y* for an account of the dealings between the two firms, alleging that *X* and *Y* have made improper profits of

(*e*) *Egbert v. Short*, [1907] 2 Ch. 205. The *ratio decidendi* seems to be the unfairness and inconvenience to *X* of his being in fact compelled to defend the action, the decision of which would depend to a great extent on the Indian rules of procedure in England, and to return to England for that purpose. As *A* knew of her alleged grievance before she left India, it looks as if *A* were using her right of suing *X* in England as a means of extortion. The case which is followed in *In re Norton's Settlement*, [1908] 1 Ch. (C. A.) 471, nevertheless goes a very long way towards limiting the right to sue in England, for a foreign cause of action, any person whatever who is served with a writ in England.

(*f*) *Thornton v. Thornton* (1886), 11 P. D. (C. A.) 176. The *ratio decidendi* is (*semble*) that *W* has *prima facie* a right to prosecute the suit, and that it was not made clear that her doing so would work oppression, or waste, or vexation. Under the circumstances of *Thornton v. Thornton* (which followed, apparently, *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1), the question there raised could now hardly occur. The High Court would not admit the possibility of any other Court than the Court of the husband's domicile possessing divorce jurisdiction (see p. 420, *post*), or that a person serving in the British army could have an Indian domicile. Compare the Indian Divorce Act, No. IV. of 1869, s. 2; Rattigan, Law of Divorce applicable to Christians in India, pp. 2, 7, 13; and Appendix, Note 17, "Divorces under the Indian Divorce Act, &c." In *Von Eckhardstein v. Von Eckhardstein* (1907), 23 T. L. R. 539, (C. A.) 593, a stay was refused when a judicial separation was asked for by the wife, and the husband had commenced divorce proceedings in Germany where he was domiciled.

agency. *X* and *Y* deny having made improper profits, and counterclaim to have the accounts of the Honduras firm, *A*, *B* and *X*, taken. Application to have counterclaim struck out. Application refused (*g*).

5. *A* and *X* are engaged in moneylending transactions in Scotland and England, though both of them reside normally in England. A dispute arises between them as to the state of accounts between them, and almost simultaneously actions are started by *X* against *A* in Scotland, and by *A* against *X* in England. *A* asks that the Court shall restrain *X* from proceeding with his action in Scotland. At the time when this application is made, *X*'s action in Scotland has been actively prosecuted, while no statement of claim has yet been delivered in *A*'s action in England. The Court declines to restrain *X* from proceedings in Scotland (*h*).

SUB-RULE.—The Court has jurisdiction to stay an action as vexatious or oppressive if proceedings are taken in respect of the same subject and against the same defendant both in the Court and in a Court of a foreign country (*i*).

(*g*) See *Mutrie v. Binney* (1887), 35 Ch. D. (C. A.) 614, 635.

(*h*) See *Cohen v. Rothfield*, [1919] 1 K. B. (C. A.) 410. Compare *In re Derwent Rolling Mills Co.* (1904), 21 T. L. R. 81, 701; *Jopson v. James* (1908), 77 L. J. Ch. 824; *In re Warrand* (1892), 93 L. T. J. 82; *Carter v. Hungerford* (1915), 59 S. J. 428; *In re Connolly Bros.*, [1911] 1 Ch. 731, 746. So in *Vardopulo v. Vardopulo* (1909), 25 T. L. R. 410, (C. A.) 518, the Court refused to restrain proceedings for divorce in the country of domicile as the appropriate forum. In *Heilman v. Falkenstein* (1917), 33 T. L. R. 383, the defendant was restrained from proceedings in the United States, the question being one of an English settlement to be construed by English law. In *Christian v. Christian* (1897), 67 L. J. P. 86, 88, a husband was restrained from proceeding with an action for divorce in Scotland pending the trial of his wife's action for judicial separation in England, on the ground that the question of domicile could be settled at once in the English action. Where an administration action is proceeding in England, and the deceased was domiciled in England, beneficiaries or creditors subject to English jurisdiction may be restrained from proceedings abroad. *Hope v. Carnegie* (1866), L. R. 1 Ch. 320; *Graham v. Maxwell* (1849), 1 Macn. & G. 71; *Carron Co. v. Maclaren* (1855), 5 H. L. C. 416, 441, 442; *Baillie v. Baillie* (1867), L. R. 5 Eq. 175; *In re Boyse* (1880), 15 Ch. D. 591. Jurisdiction to restrain may similarly be exercised to secure equality in the distribution of assets in company liquidation, see Rule 83, p. 372, *post*. For the Scottish doctrine of *forum non conveniens*, see *Maclaren*, Court of Session Practice, pp. 70—77.

(*i*) I.e., of any country which is not England. See pp. 68, 71, *ante*.

- (1.) If such foreign Court is a Court of the United Kingdom or (*semble*) of any country forming part of the British dominions, the plaintiff's proceedings are *prima facie* vexatious (*k*).
- (2.) If such foreign Court is a Court of any country not forming part of the British dominions, the plaintiff's proceedings are *prima facie* not vexatious (*l*).

Comment.

"I think," said Bowen, L. J., "that *Cox v. Mitchell* (*m*) . . . simply lays down the proposition that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same. So understood, it seems to me to be common sense. . . . This particular application is based on the suggestion that the Court ought to interfere to prevent what is called multiplicity of suits—litigation in various quarters of the world on the same subject-matter between the same parties and at the same time. [1.] Where there is more than one suit being carried on in the Queen's Courts [in England], it is obvious that the case is wholly different. The remedy and the procedure are the same, and a double action on the part of the plaintiff would lead to manifest injustice. [2.] When you get to the case of concurrent litigation both in the Queen's Courts in England and in the Queen's Courts in Ireland and Scotland, the law has probably varied a little. At a time when it was difficult to enforce the judgments of an English Court in other parts of the United Kingdom, it was not unreasonable that the case of *Lord Dillon v. Alvares* (*n*) should have been decided as it was. At present I think that case can no longer be cited as conclusive law. I have spoken of the Queen's Courts in Ireland and Scotland. [3.] With regard to the Queen's Courts abroad, the Consular Courts abroad, the same sort of principle no doubt applies. They are Courts of co-ordinate jurisdiction, sufficiently in the

(*k*) *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 408, judgment of Bowen, L. J.; but compare *Cohen v. Rothfield*, [1919] 1 K. B. (C. A.) 410.

(*l*) *Ibid.*; *Cox v. Mitchell* (1859), 7 C. B. (N. S.) 55; *Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd.* (1911), 105 L. T. R. 846; and compare Rule 79, p. 355, *ante*.

(*m*) (1859), 7 C. B. N. S. 55.

(*n*) (1798), 4 Ves. 357.

"nature of English Courts to render it probable that it may be true, as Sir Robert Phillimore says, that an English Court would not favour the institution and the prosecution of litigation both in the Consular Courts and at home. [4.] But when you come to the Courts of the United States of America [or of any country not forming part of the British dominions], it seems to me the case is wholly different, and for the reasons which have been pointed out at length by the Master of the Rolls and Lord Justice Cotton. The fact that no English action has ever yet been stayed on the ground of concurrent litigation in America is a strong argument to prove that such concurrent American litigation is not by itself a sufficient reason why an English action should be stayed. That the Court has power to do it I agree. It is clear, not merely from reason, but from the language of Lord Cottenham (*o*) and Lord Cranworth (*p*), referred to by Lord Justice Cotton, that this Court could do it if necessary for the purposes of justice, but some special circumstances ought surely to be brought to the attention of the Court beyond the mere fact that an action is pending between the parties on the same subject-matter in America" (*q*).

Illustrations.

1. *A*, who has commenced an action against *X* in a Scottish Court, also commences an action against him for the same cause of action in the High Court. *A*'s proceedings are *primâ facie* vexatious (*r*).

2. *A* brings an action against *X* in Victoria, and also for the same cause of action brings an action against *X* in the High Court. *A*'s proceedings are (*semble*) *primâ facie* vexatious (*r*).

3. *A* brings an action against *X* in the Court for breach of contract committed at New York. He has already commenced an

(*o*) *Wedderburn v. Wedderburn* (1837), 4 My. & Cr. 596.

(*p*) *Carron Iron Co. v. McLaren* (1855), 5 H. L. C. 416, 437.

(*q*) *McHenry v. Lewis* (1882), 22 Ch. D. (C. A.) 397, 408, 409, judgment of Bowen, L. J. Compare judgment of Cotton, L. J., *ibid.*, pp. 405, 406.

It may happen that *A*, who is plaintiff in an action in a foreign country against *X* in respect of a particular claim, makes the same claim here in England in the shape of a counterclaim in an action brought by *X* against *A*. Such a counterclaim will not *primâ facie* be treated as vexatious, but under peculiar circumstances the plaintiff may be treated as one who has, in effect, brought concurrent actions in respect of the same cause of action both in England and in a foreign country. *Mutrie v. Binney* (1887), 35 Ch. D. (C. A.) 614.

(*r*) See Sub-Rule, cl. 1; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141; *Huntly v. Gaskell*, [1905] 2 Ch. 656.

action in a New York Court against *X* for the same breach of contract. *A*'s proceedings are not *primâ facie* vexatious (*s*).

4. *A & Co.*, an English company, brings an action against *X* and *Y*, a firm of French merchants, for non-delivery of the cargo of certain ships, and in the alternative for damages and for an injunction. When the action began the ships were in British waters. They have since been removed to ports in France and taken possession of by *X* and *Y*. Proceedings have been commenced by *A & Co.* in a French Court for the recovery of the cargoes. The claim in the English action comprises the cargo of a ship which is not claimed in the French action. The proceedings of *A & Co.* are not vexatious (*t*).

(*s*) See Sub-Rule, cl. 1; *Logan v. Bank of Scotland* (No. 2), [1906] 1 K. B. (C. A.) 141.

(*t*) *Peruvian Guano Co. v. Bockwoldt* (1883), 23 Ch. D. (C. A.) 225, 232, 233. In *Pena Copper Mines, Ltd. v. Rio Tinto Co., Ltd.* (1912), 105 L. T. 846, an injunction was issued restraining the defendants, who had brought an action unsuccessfully in England on a contract containing a clause providing that it was to be construed as an English contract, from proceeding with an action in Spain on the contract. The contract provided for recourse to arbitration, and the Court of Appeal held that the defendants could not by proceedings abroad defeat the intention of the clause, relying on *Hamlyn & Co. v. Talisker Distillery Co.*, [1894] A. C. 202.

CHAPTER XI.

EXTRA-TERRITORIAL EFFECT OF
ENGLISH JUDGMENT;
ENGLISH BANKRUPTCY;
ENGLISH GRANT OF ADMINISTRATION.

(A) ENGLISH JUDGMENT.

RULE 80.—A judgment of the Court (called in this Digest an English judgment) has, subject to the exceptions hereinafter mentioned, no direct operation out of England.

The extra-territorial effect (if any) of an English judgment is a question of foreign law.

Comment.

The judgment, or in other words the command of a Court, cannot of itself operate beyond the limits of the territory over which the Court has jurisdiction. An English judgment, therefore, has, *proprio vigore*, no operation in any country but England. The Courts of a foreign country may, and no doubt in many cases will, give effect to an English judgment, or, more strictly, to the right acquired under it (*a*). But whether, to what extent, and by what means, a foreign, *e.g.*, a French or Victorian Court, will enforce a right acquired under an English judgment, is a question not of English but of foreign law.

Exception 1.—An English judgment for any debt, damages, or costs may be rendered operative in Ireland or Scotland by registration of a certificate thereof in accordance with the provisions of Rule 116 (*b*).

(*a*) See Intro., pp. 25, 26, *ante*.

(*b*) See chap. xvii., Rule 116, *post*, as to the extension of certain judgments *in personam* throughout the United Kingdom; and Judgments Extension Act, 1868 (31 & 32 Vict. c. 54). See also Rule 117, *post*, as to the extension to other parts of the British dominions of judgments of Courts of the United Kingdom.

Exception 2.—Any order of an English Bankruptcy Court shall be enforced in Scotland and Ireland in the Courts having jurisdiction in bankruptcy there in the same manner as if the order had been made by the Court which is required to enforce it (*c*).

Exception 3.—Any order made by the Court in England having jurisdiction to wind up a company, in the course of such winding-up shall be enforced in Scotland and Ireland in the Courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland, and in the same manner in all respects as if the order had been made by these Courts (*d*).

Exception 4.—The powers and authority with regard to the administration and management of the estates of lunatics conferred by the Lunacy Act, 1890, and amending Acts on the Judge in Lunacy apply to the property of a lunatic, whether immovable or movable, situate in any British possession (*e*).

Exception 5.—The powers of the Court in England to make vesting orders under the Trustee Act, 1893, shall extend to all lands and personal estate in the British dominions except Scotland (*f*).

(*c*) See the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 121. Similar provision is made for the enforcement in England of orders of the Scottish and Irish Bankruptcy Courts.

(*d*) See the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 180. Similar provision is made for the enforcement in England of orders made by the Courts in Scotland and Ireland in the course of the winding-up of companies registered in Scotland or Ireland.

(*e*) See the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 110. The powers conferred by that Act are extended by 8 Edw. 7, c. 47. See Rule 147, p. 533, *post*.

(*f*) See the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 41. For the cases in which vesting orders may be made by the Court, see especially sects. 26, 29 and 35 of the Act. Similar powers were given to the Irish Courts by the Trustee Act, 1893, Amendment Act, 1894 (57 & 58 Vict. c. 10), s. 2. Compare *In re Hewitt* (1858), 6 W. R. 537; *In re Lumotte* (1876), 4 Ch. D. 325.

(B) ENGLISH BANKRUPTCY (*g*) AND WINDING-UP OF COMPANIES (*h*).

I. BANKRUPTCY.

(i) As an Assignment (i).

RULE 81 (*k*).—An assignment of a bankrupt's property to the trustee in bankruptcy under the Bankruptcy Act, 1914 (English bankruptcy), is, or operates as, an assignment of the bankrupt's

(1) immovables (*l*) (land),

(2) movables (*m*),

whether situate in England or elsewhere.

Comment.

Under the Bankruptcy Act, 1914, s. 167, the bankrupt's "property" (*n*) "includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined" (*o*).

(*g*) For the Court's jurisdiction in Bankruptcy, see chap. viii., p. 312, *ante*.

(*h*) For the Court's jurisdiction in Winding-up of Companies, see chap. viii., p. 329, *ante*.

(*i*) See the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 18, sub-s. 1, with which read sects. 37—45, 53, and 167. See, generally, as to the extra-territorial effect of bankruptcy as an assignment, Westlake (5th ed.), chap. vi., pp. 163—192; Phillimore, ss. 765—779; Foote (4th ed.), pp. 301—312; Goudy, *Law of Bankruptcy in Scotland* (4th ed.), chap. xlviii.; Story, ss. 405—422; Baldwin, pp. 281—283.

Westlake's treatment of this topic is full, and deserves special attention.

(*k*) See the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 38, 53, 167; Williams (11th ed.), pp. 252, 253; *In re Anderson*, [1911] 2 K. B. 896.

(*l*) For definition of "immovables," see pp. 68, 75—77, *ante*.

(*m*) For definition of "movables," see pp. 69, 75—77, *ante*.

(*n*) With certain limited exceptions, which have nothing to do with the rules of private international law, *e.g.*, property held by the bankrupt in trust for another person, or tools or wearing apparel of the bankrupt, his wife and children. See Bankruptcy Act, 1914, s. 38.

(*o*) See Bankruptcy Act, 1914, s. 167. See as to the interpretation of this section in Scotland, *Salaman v. Tod*, [1911] S. C. 1214, where an English bankruptcy was held to operate to affect an interest of the nature of a *spes successionis*, which would not have passed to the trustee in a Scottish bankruptcy.

Hence, speaking generally, the bankruptcy (*i.e.*, the debtor's being adjudicated a bankrupt) transfers to the trustee, as far as an Act of Parliament can accomplish this result, all the bankrupt's property, whatever its situation, and this irrespective of the bankrupt's domicile or nationality (*p*). The bankruptcy, moreover (except in the case of certain *bonâ fide* transactions without notice specially protected by the bankruptcy law) (*q*), relates or dates back, as far as the title of the trustee is concerned, to the "commencement of the bankruptcy," and by this term is meant the time of the act of bankruptcy, or (if the bankrupt is proved to have committed more acts of bankruptcy than one) of the first act of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition (*q*). And this doctrine of relation applies to all property of the bankrupt, wherever situate, at any rate within the British dominions (*r*).

The property so vested must be in strictness "property of the "bankrupt"; and property which once belonged to the bankrupt, if it has before the commencement of the bankruptcy become already vested in some other person, *e.g.*, in the trustee under a Scottish bankruptcy (*s*), is not the property of the bankrupt, and does not vest in the trustee under the English bankruptcy (*t*).

Moreover, if a bankruptcy in one country operates as an assignment of property situate in another, the property passes, speaking generally, subject to any charges which are recognised as pertaining to it under the law of the country in which it is situated (*u*).

The exact extent, however, to which an English bankruptcy operates outside the United Kingdom in respect of immovable and

(*p*) Under the Bankruptcy Act, 1914, English Courts give to an English bankruptcy a wider effect than they would independently of Acts of Parliament (see Rule 122) give to a foreign bankruptcy. (See Rules 123 and 124, *post*.) See *Sill v. Worswick* (1791), 1 H. Bl. 665; *Selkirk v. Davis* (1814), 2 Rose, 291; *Royal Bank of Scotland v. Cuthbert* (1813), 1 Rose, 462. Compare *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640.

(*q*) Bankruptcy Act, 1914, s. 45.

(*r*) See chap. xxix. for the application of special rules of bankruptcy as against foreign creditors.

(*s*) See Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. 5, c. 20), s. 97.

(*t*) Compare Nelson, p. 169. A judgment *in rem* in a foreign Court even after the commencement of the bankruptcy would apparently defeat the trustee's title. Compare *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. (C. A.) 460 (company liquidation).

(*u*) See *Re Somes, Ex parte De Lemos* (1896), 3 Mans. 131; *Galbraith v. Grimshaw*, [1910] A. C. 508.

movable property is a matter of some difficulty. It is submitted that the proper construction of the Act of 1914, as of the Act of 1883, is as follows:—

(1) An English bankruptcy operates as an assignment to the trustee of all immovable and movable property of the bankrupt situated in any British possession, subject, however, to the carrying out of any formalities requisite under the local law in respect of conveyances or assignments of property.

With regard to real property this principle was expressly enacted in 1849 (12 & 13 Vict. c. 106, s. 142), and its operation has been recognised by the Judicial Committee of the Privy Council (x). The enactment does not override the local law as to the formalities regarding a transfer of ownership, but sect. 53 (4) of the Act of 1914 provides that “the certificate of appointment of a trustee “shall, for all purposes of any law in force in any part of the “British dominions requiring registration, enrolment, or record- “ing of conveyances or assignments of property, be deemed to “be a conveyance or assignment of property, and may be regis- “tered, enrolled, and recorded accordingly.” The trustee has, therefore, the right to secure control of the whole of the bankrupt’s property of any kind, and may invoke, if necessary, the assistance of the local Court exercising bankruptcy jurisdiction under sect. 122 of the Act (y).

(2) An English bankruptcy operates as an assignment to the trustee of immovable or movable property situate without the British dominions, only in so far as the law of the country where the property is situate makes provision to this effect. But the trustee is under the duty of obtaining, so far as the law of such country permits, control of the bankrupt’s property, and the bankrupt must render him all possible assistance in this regard.

It is clear that under the recognised principles of the interpretation of British Acts of Parliament it cannot be assumed that it is the purpose of the Act of 1914 to operate so as to effect of itself an assignment of the bankrupt’s property outside the British dominions, and no judicial decision supports such an

(x) See *Callender v. Colonial Secretary of Lagos*, [1891] A. C. 460; *Ex parte Rogers* (1881), 16 Ch. D. (C. A.) 665, 666, per Jessel, M. R. See also Rule 122, p. 471, *post*; and compare *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349, 358.

(y) Westlake’s suggestion (sect. 137) of a distinction of the effect according to the degree of self-government enjoyed by the Colonies is clearly impossible.

interpretation of the Act. On the other hand, it is equally clear that it is the intention of the Act so far as possible to secure that the property of a bankrupt situate outside the British dominions shall be made available for the payment of his debts, and there can be no doubt that if the debtor is personally within the jurisdiction of the Court he may be ordered to execute in the proper form any instruments which may be necessary under the law of the country, in which his property is situate, to transfer the ownership of the property to the trustee (z). The trustee is clearly under obligation to make every reasonable effort by application to the Courts or otherwise to realise the debtor's property for the benefit of the creditors.

From a practical point of view the question is of importance in those instances in which a creditor of the bankrupt who has obtained possession of property of the bankrupt in some country outside of the British dominions comes within the sphere of jurisdiction of the English Courts. Unfortunately there is extremely little judicial authority of recent date bearing on this topic. The older cases (a) were decided at a time when the bankruptcy law was in a state of imperfect development and when the conflict of laws had been little studied. The following principles, however, may be laid down with a fair amount of certainty:—

(1) A creditor who receives abroad any part of the bankrupt's property will not be allowed to prove under the English bankruptcy, unless he brings into the common fund the part so acquired (b). The Act aims at securing that all the property of the bankrupt shall be available in payment of his debts, and it seems clear that any person who seeks to prove under the bankruptcy must be subject as regards his claim to this principle. The Rule will, accordingly, apply whatever the nature of the property

(z) Contrast *Selkirk v. Davis* (1814), 2 Rose, 291; *Cockerell v. Dickens*, 3 Moore, P. C. 98, 133, decided respectively before the Act of 1849, and the Indian Insolvency Act, 1848 (11 & 12 Vict. c. 21), s. 7. Express provision is made in the case of Scotland by 3 & 4 Geo. 5, c. 20, s. 77, imprisonment being provided in default of action by the bankrupt. Cf. the Act of 1914, s. 22; *In re Harris* (1896), 74 L. T. 221.

(a) *Hunter v. Potts* (1791), 4 T. R. 182; *Sill v. Worswick* (1791), 1 H. Bl. 665; *Philips v. Hunter* (1795), 2 H. Bl. 402; Westlake (5th ed.), ss. 142, 143, pp. 187, 188; Conflict (2nd ed.), pp. 333—336.

(b) *Ex parte Wilson* (1872), L. R. 7 Ch. 490; *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161. See also the Scottish cases, *Lindsay v. Paterson* (1840), 2 D. 1373; *Stewart v. Auld* (1851), 13 D. 1337; *Clydesdale Bank v. Anderson* (1890), 27 Sc. L. R. 493.

or the means by which the creditor obtained possession of it, and whatever the nationality of the creditor.

(2) If the creditor has recovered property of the bankrupt under the judgment of a Court abroad delivered with knowledge of the English bankruptcy, the trustee cannot by an action in England compel him to refund the value of the property thus covered. This is in strict accordance with the rule that a title to property in a foreign country acquired under a judgment of the foreign Court is to be regarded as valid in the English Courts (c).

(3) If the creditor has recovered property without legal process, or by legal process, but without notice of the bankruptcy to the Court, the case is more doubtful. The older authorities suggest that the creditor should be held to have recovered the property to the use of the trustee, and therefore to be compellable by action in England to refund it to the trustee, at any rate if the creditor is a British subject and *eo nomine* subject to English law (d). It is submitted, however, that the true criterion should be whether or not the law of the country in which the property was recovered recognizes the title of the trustee under the English bankruptcy, and that, if it does not do so (e), the creditor cannot be held to be liable to refund, even if he is a British subject. It is uncertain whether the Court would restrain a creditor subject to its jurisdiction from proceedings abroad tending to interfere with the equal distribution of the assets of the bankrupt (f).

The fact that the Act gives extra-territorial validity throughout the British dominions to an English bankruptcy raises the question whether any Court in these dominions can treat an

(c) See *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; Phillimore (3rd ed.), s. 770, pp. 617, 618. None of these cases directly deals with bankruptcy, but the principle is clearly applicable, nor is there any sufficient ground to except the case where the creditor is a British subject. See also *Sill v. Worswick* (1791), 1 H. Bl. 665, 693; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. (C. A.) 460.

(d) See *Sill v. Worswick* (1791), 1 H. Bl. 665; *Philips v. Hunter* (1795), 2 H. Bl. 402.

(e) This is consistent, so far at least as foreign creditors are concerned, with the dicta of Loughborough, L. C. J., in *Sill v. Worswick* (1791), 1 H. Bl. 665, 693. *Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161, 167, per Earl Cairns, suggests that the creditor can retain in any case, unless he seeks to prove in the bankruptcy. Compare Lord Selborne at p. 169.

(f) Compare *In re Southeastern of Portugal Railway Co.* (1869), 17 W. R. 982; *In re North Carolina Estate Co.* (1889), 5 T. L. R. 328; *In re Belfast Shipowners' Co.*, [1894] 1 Ir. R. 321, which are cases of winding-up.

English bankruptcy as invalid, on the ground, *e.g.*, that in the opinion of a Scottish or Victorian Court the English Court has exceeded the jurisdiction conferred upon it by the Act of 1914. The answer to this question seems clearly to be that any Court in the British dominions must treat the English bankruptcy as valid, and that any person who asserts that the English Court has exceeded its jurisdiction, *e.g.*, by adjudging bankrupt a person not subject to the English bankruptcy law, must appeal to the proper tribunal in England and cannot ask a Court in the British dominions to review the decision of the English Court (*g*). This would appear to be the case even if the person aggrieved alleges that the English Court has acted under a misapprehension of fact, *e.g.*, as to his domicile, or that the adjudication in bankruptcy was obtained by fraud, and it is obvious that any other view would result in a serious impairment of the effectiveness of the principle of the operation throughout the British dominions of an English bankruptcy.

Illustrations.

In the following illustrations *N* is a debtor made bankrupt under the English Bankruptcy Act, 1914:—

1. *N*, at the time of his being adjudicated bankrupt, possesses movables, *viz.*, money and debts, owing to him in Scotland, the Isle of Man, and Victoria. The bankruptcy is an assignment to the trustee in bankruptcy of such money and debts (*h*).

2. *N*, at the time of his being adjudicated bankrupt, possesses land in Scotland, the Isle of Man, and in Victoria. The bankruptcy is an assignment to the trustee of such land, and authorises the trustee to proceed to take such steps as may be necessary under the local law to obtain due registration and record of the transfer of ownership of the land from *N* to the trustee (*i*).

3. *N*, at the time of his being adjudicated bankrupt, possesses shares in a railway company registered in Victoria. The bankruptcy is an assignment to the trustee of *N*'s right to the shares, and authorises the transfer of these shares, on application by the

(*g*) See the Bankruptcy Act, 1914, ss. 121, 122, the terms of which seem to exclude any discretion on the part of the Courts in regard to the validity of English adjudications, and it has been so held in Scotland. *Wilkie v. Cathcart* (1870), 9 M. 168.

(*h*) See p. 366, *ante*.

(*i*) See p. 366, *ante*.

trustee, from the name of *N* to that of the trustee in the company's register.

4. *N*, at the time of his being adjudicated bankrupt, possesses land and goods in Italy. The bankruptcy is an assignment of the land and goods to the trustee, in so far as the law of Italy permits it to operate as such an assignment, but not otherwise (*k*).

5. *N*, after the commencement of the bankruptcy, but a month before he is adjudicated bankrupt, possesses goods and money in Scotland and Victoria. The bankruptcy is an assignment to the trustee in bankruptcy of such goods and money to the same extent to which it would have been an assignment if the goods and money had been situate in England (*l*).

6. After *N* is adjudicated bankrupt, *X* recovers from him in New York, whether with or without legal process, 100*l.* due from *N* to *X*. *X* then attempts to prove under *N*'s bankruptcy for a sum of 500*l.* also due by *N* to *X*. He will not be allowed to prove unless he pays over to *A*, the trustee, the 100*l.* recovered (*m*).

7. After *N* is adjudicated bankrupt, *X* obtains by proceedings in a New York Court, which has due notice of the English bankruptcy, 1,000*l.* due by *N* to *X*. *X* comes to England, and is sued by *A*, the trustee, for the 1,000*l.* *A* cannot recover, and (*semble*) it makes no difference whether *X* is a British subject or not (*n*).

8. After *N* is adjudicated bankrupt, *X* recovers from him in New York, whether with or without legal process (the Court having no knowledge of the English bankruptcy), payment of a debt of 1,000*l.* *X* comes to England, and *A* claims, as trustee, repayment of the 1,000*l.* Whether *A* can recover depends on the effect given by New York law to an English bankruptcy (*o*).

(*k*) See p. 366, *ante*.

(*l*) As to the effect of an English bankruptcy on antecedent transactions, see Bankruptcy Act, 1914, ss. 37, 40—47.

(*m*) See p. 367, *ante*.

(*n*) See p. 368, *ante*. Compare *Ex parte Smith* (1862), 31 L. J. B. 60, in which case creditors of a bankrupt English partnership were allowed to retain a dividend in the bankruptcy, though later they obtained a larger dividend from a bankrupt foreign partnership for the same debt, but were not allowed further dividends in the English bankruptcy.

(*o*) Compare *Ex parte Smith* (1862), 31 L. J. B. 60, where stress was laid on the absence of any proof that by the foreign law the creditors were not entitled to dividends in both bankruptcies.

(ii) *As a Discharge.*

RULE 82(*p*).—A discharge under an English bankruptcy from any debt or liability, is in any country, forming part of the British dominions, a discharge from such debt or liability, wherever or under whatever law the same has been contracted or has arisen.

II. WINDING-UP.

RULE 83.—The winding-up of a company under the Companies (Consolidation) Act, 1908(*q*), impresses the whole of the property of the company in the United Kingdom with a trust for application in the course of the winding-up, for the benefit of the persons interested in the winding-up.

Comment.

The principles applicable to the winding-up of a company differ in essential respects from those affecting bankruptcy(*s*). It is now definitely established(*t*) that the Companies Acts do not, except when express provision is made to the contrary, affect the rights and liabilities which a company may possess outside the United Kingdom, and that in particular property outside the United Kingdom does not become vested in the liquidator by virtue of a

(*p*) See *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Edwards v. Ronald* (1830), 1 Knapp, 359. For the comment on, and illustrations of, this rule see chap. xviii., Rules 126—128, *post*, where the whole of the rules as to the extra-territorial effect of bankruptcy as a discharge are laid down and explained.

(*q*) Part IV., ss. 122—242; as to the powers of liquidators, see especially ss. 149—159.

(*r*) This Rule, with the Comment thereon, may be compared with the suggestions of Westlake (5th ed.), ss. 138, 141, 142, p. 189. See also *In re Oriental Inland Steam Co., Ex parte Scinde Railway Co.* (1874), L. R. 9 Ch. 557; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. 55, (C. A.) 460; *New Zealand Loan and Mercantile Co. v. Morrison*, [1898] A. C. 349; and *In re Nelson*, [1918] 1 K. B. (C. A.) 456 (a case of bankruptcy).

(*s*) Rules 81, 82, pp. 364, 371, *ante*.

(*t*) *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349. See also *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, and *Queensland Mercantile and Agency Co., Ltd. v. Australasian Investment Co., Ltd.* (1888), 15 R. 935, 939.

winding-up order. On the other hand, the liquidator is empowered to take into his custody all the property and things in action to which the company is entitled in the United Kingdom (*u*), and any order made by the Court in England in the course of winding-up a company shall be enforced in Scotland and Ireland in the Courts that would respectively have jurisdiction in respect of that company if registered in Scotland or Ireland (*x*).

Where any company registered in England is being wound up by or subject to the supervision of the Court, any attachment, sequestration, distress, or execution, put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents (*y*). A difficult question, however, arises with regard to the case where a company, though registered in England, carries on business abroad, and after the commencement of the winding-up a creditor obtains judgment against the company and levies execution on its effects, while at the same time he claims repayment from the liquidator of sums due to him from the company in England. It is, however, expressly provided in the Companies (Consolidation) Act, 1908, s. 207, that in the winding-up of an insolvent company registered in England, the same rules shall be observed with regard to the respective rights of secured and unsecured creditors, and to debts provable, as are in force for the time being under the law of bankruptcy in England with respect to the estate of a bankrupt. It seems, therefore, to follow that a creditor who desires to benefit under the winding-up must give up for the benefit of other creditors any advantage which he may have obtained for himself by proceeding against the company after the commencement of the winding-up in any British possession, or other foreign country (*z*).

(*u*) The Companies (Consolidation) Act, 1908, ss. 150, 186.

(*x*) *Ibid.* s. 180.

(*y*) *Ibid.*, s. 218; as to unregistered companies, see s. 273. As to the power of the English Courts to enforce by restraining proceedings in other parts of the United Kingdom, see *In re International Pulp and Paper Company* (1876), 3 Ch. D. 594, decided under the Companies Act, 1862, ss. 87 and 122. The power may also be exercised to restrain proceedings in any foreign country, provided of course the creditor to be restrained falls within the jurisdiction of the Court. This jurisdiction may be exercised even if the creditor has not made any claim in the liquidation. *In re Central Sugar Factories of Brazil*, [1894] 1 Ch. 369. See p. 358, note (*h*), *ante*.

(*z*) Compare *In re Oriental Inland Steam Co.* (1874), L. R. 9 Ch. 557, which, however, seems to have been decided under the influence of the view that the principle of *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, was appli-

The case of the winding-up of a company not registered in England stands on a different footing. As we have seen (*a*), the winding-up can deal only with the corporate character of the company in England, and it does not appear that in such a case in the distribution of the effects any regard can be had to matters affecting the company outside the United Kingdom.

Illustrations.

1. *X & Co.*, a company registered in England, carries on its business largely in British India. An order is made for the winding-up of the company. *A*, a customer of the company, has accounts outstanding against it at the date of the commencement of the winding-up for 27,000*l.* in England, and 5,000*l.* in India for goods supplied. After that date he brings an action against the company in India, and recovers by execution levied on the property of the company there, 2,000*l.* *A* cannot (*semble*) retain this sum and prove for his claim in the winding-up in England (*b*).

2. *X & Co.* is a company incorporated under the English Companies Acts, and has its head office in England. *X & Co.* incurs in Victoria a debt of 3,000*l.* to *A*. After the debt is incurred an order is made on the application of *X & Co.* by the High Court for winding up the company. A scheme of arrangement is made in

cable to a winding-up under the Companies Acts, and placed the property of the company in a British possession under the management of the liquidators. See also Stiebel, *Company Law*, pp. 1026, 1027.

(*a*) See Rule 74, pp. 331, 333, *ante*.

(*b*) See *In re Oriental Inland Steam Co.* (1874), L. R. 9 Ch. 557; *In re North Carolina Estate Co.* (1889), 5 T. L. R. 328; *In re Belfast Shipowners' Co.*, [1894] 1 Ir. R. 321; *In re International Pulp and Paper Co.* (1876), 3 Ch. D. 594; *In re Central Sugar Factories of Brazil, Flaok's case*, [1894] 1 Ch. 369, which are cases of restraining creditors of companies in liquidation from proceedings abroad against property of the companies. Contrast *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. (C. A.) 460, in which it was held that creditors of an English company in liquidation who recovered damages from the company in an Admiralty action *in rem* in a German Court could not be adjudged to hold the amount recovered as trustees. The decision was founded on the fact that the German judgment was in an action *in rem* based on the arrest of a ship of the company, and gave an absolute title. A creditor is, of course, entitled to the benefit of any real charge which he has by local law. See *In re West Cumberland Iron and Steel Co.*, [1893] 1 Ch. 713.

The effect of a mere appointment of receivers is quite different from that of a winding-up, and does not justify restraining creditors from proceeding abroad. *In re Maudslays, Field and Sons*, [1900] 1 Ch. 602.

accordance with the Companies Acts, and under these Acts is binding upon all creditors. *A*, after the arrangement is arrived at, brings an action against *X & Co.* in a Victorian Court for the amount due to him. The arrangement under the Companies Acts does not in Victoria discharge *X & Co.* from liability for the debt (*c*).

(C) ENGLISH GRANT OF ADMINISTRATION (*d*).

RULE 84 (*e*).—An English grant has no direct operation out of England.

This Rule must be read subject to Rules 88 to 90 (*f*).

Comment.

An English grant of probate or of letters of administration does not, of course, confer upon the personal representative even of a man who has died domiciled in England power to sue in a foreign Court, except in so far as the law administered by that Court concedes him the right (*g*).

RULE 85 (*h*).—An English grant extends to all the movables of the deceased, wherever situate, at the time of his death, at least in such a sense that a person who

(*c*) *New Zealand Loan and Mercantile Agency Co. v. Morrison*, [1898] A. C. 349.

(*d*) Williams, Executors (11th ed.), pp. 267—269, and especially, Westlake (5th ed.), pp. 130—131. For jurisdiction to make a grant, see Rules 75 and 76, pp. 335, 339, *ante*.

(*e*) See Williams, Executors, pp. 267—269; *Atkins v. Smith* (1740), 2 Atk. 63.

(*f*) See especially, as to extension of English grant to Ireland and to Scotland respectively, Rules 88, 89, pp. 381, 382, *post*, and as to extension to colonies, compare Rule 90, p. 384, *post*.

(*g*) Williams, Executors, p. 274.

(*h*) *Whyte v. Rose* (1842), 3 Q. B. 493, 507; *Scarth v. Bishop of London* (1828), 1 Hagg. Ecc. 625. "An English grant of probate or administration properly obtained here is by the English Courts regarded as extending to all the personal property of the deceased, wherever situate at the time of his death, at least in such a sense that a representative duly constituted in England may sue in England in relation to foreign assets." Foote, p. 272. This sentence accurately sums up the position of an English administrator, except that the word "movables" ought apparently to be substituted for "personal property," as an English administrator could not bring an action in England in relation, *e.g.*, to leaseholds situate in New York. See Rule 53, p. 223, *ante*. Compare *In re Scott, Scott v. Scott*, [1916] 2 Ch. (C. A.) 268.

has obtained an English grant (who is hereinafter called an English administrator) may—

- (1) sue in an English Court in relation to movables of the deceased situate in any foreign (*i*) country;
- (2) receive (*k*) or recover in a foreign country movables of the deceased situate in such country (?).

Comment.

Though the jurisdiction of the Court to make a grant arises from there being property of the deceased (however small in amount) situate in England (*l*), an ordinary grant (*m*) constitutes the administrator the representative of the deceased, not only in respect of the property the presence of which in England gave the Court jurisdiction, but also in respect of the whole of the deceased's movable property. No doubt there is some difficulty in determining what is the precise effect of an English grant on property situate abroad, and the question what is its effect is further considered in the comment on Rule 87 (*n*). Thus much, however, appears to be certain. An English administrator can sue in an English Court in respect of movables of the deceased situate abroad, *e.g.*, in Victoria or in France; nor would it here be any answer to an action by the administrator in respect of such movables that the deceased did not die domiciled in England. The administrator, further, has, as far as English Courts are concerned, the right to receive or recover in a foreign country movables

(*i*) And of course if situate in England.

(*k*) See *Atkins v. Smith* (1740), 2 Atk. 63.

(*l*) See Rule 76, p. 339, *ante*.

(*m*) *I.e.*, a grant which is not in any way limited. See p. 340, note (*n*), *ante*.

"All personal [*i.e.*, movable] property follows the person, and the rights of a person constituted in England representative of a party deceased, domiciled in England, are not limited to the personal property in England, but extend to such property wherever locally situate. So, where general probate has been granted in England of the will of a domiciled Scotchman, the ordinary judgment may be obtained here for administration of the personal estate, without limiting it to the English assets." Walker & Williams (5th ed.), p. 122, citing *Stirling-Maxwell v. Cartwright* (1879), 11 Ch. D. (C. A.) 522; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34. But a limited grant may be made in a fit case. *In re Estate of Von Brentano*, [1911] P. 172; *Patteson v. Hunter* (1861), 30 L. J. P. & M. 272.

(*n*) See p. 379, *post*.

of the deceased. But it of course depends on the law, not of England, but of the foreign country, whether he has there, in accordance with its law, the right to receive such movables.

Illustrations.

In the following illustrations *A* is the administrator of *T* under an English grant:—

1. *X*, a Frenchman resident in France, has before *T*'s death made a contract with *T*, which was to be performed in England, and has broken it. *A* can bring an action against *X* in England for the breach of contract.

2. *X*, a Frenchman resident in France, converts in France goods of *T*. *X* comes to England. *A* can sue *X* in England for the conversion (*o*).

3. *X*, an American living in New York, owes 100*l.* to *T*. *A* has a right (*p*) to receive payment of the debt from *X*, and *A* has also a right to recover payment of the 100*l.* from *X* by any proceedings in the Courts of New York which are allowed by the law of New York, *e.g.*, by obtaining in New York a grant of administration, and bringing an action there against *X*.

RULE 86(*q*).—When a person dies domiciled in England, the Courts of any foreign country ought, by means of a grant (*r*), or otherwise, to enable the English administrator to act as personal representative of the deceased in such foreign country, in regard to any movable there situate.

Comment.

An English Court has no power to dictate to the tribunals of foreign countries what is the course which they ought to pursue. According, however, to the doctrines of English law, the beneficial succession to a deceased person's movables is governed by the law of his domicile (*lex domicilii*) (*s*), and the Courts of his domicile have primary (*t*), though not exclusive, jurisdiction to determine

(*o*) *Whyte v. Rose* (1842), 3 Q. B. 493, 506.

(*p*) *I.e.*, according to English law.

(*q*) *Atkins v. Smith* (1740), 2 Atk. 63; *Burn v. Cole* (1762), Amb. 415.

(*r*) For meaning of "grant," see Rule 75, p. 335, *ante*.

(*s*) See chap. xxxi., Rules 193—197, *post*.

(*t*) The Court can restrain persons subject to its jurisdiction from taking proceedings abroad against the estate of a person domiciled in England if an

the succession to such movables (*u*). It follows, therefore, that the representative under an English grant of a deceased person who has died domiciled in England ought, in the opinion of English judges, to be placed by the Courts of any foreign country, where the deceased has left movable property, in a position there to represent the deceased. The claim, however, of the English administrator of a person who has died domiciled in England, to be made representative of the deceased in a foreign country, is by no means an absolute one. "The grant of probate," it has been laid down, "does not, of its own force, carry the power of dealing "with goods beyond the jurisdiction of the Court which grants it, "though that may be the Court of the testator's domicile. At most "it gives to the executor a generally recognised claim to be "appointed by the foreign country or jurisdiction. Even that "privilege is not necessarily extended to all legal personal representatives, as, for instance, when a creditor gets letters of "administration in the Court of the domicile" (*x*).

RULE 87 (*y*).—The following property (*z*) of a deceased person passes (*a*) to the administrator under an English grant:—

(1) Any property of the deceased which at the time

administration action has been begun in England. See *Graham v. Maxwell* (1849), 1 Mac. & G. 71; *Carron Iron Co. v. MacLaren* (1855), 5 H. L. C. 416, 441, 442; *In re Boyse* (1880), 15 Ch. D. 591; *Hope v. Carnegie* (1866), L. R. 1 Ch. 320; *Baillie v. Baillie* (1867), 5 Eq. 175; *In re Low*, [1894] 1 Ch. (C. A.) 147.

(*u*) See chap. xvi., Rule 102, *post*; *Enohin v. Wylie* (1862), 10 H. L. C. 1; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; (1885) 10 App. Cas. 453.

(*x*) *Blackwood v. The Queen* (1882), 8 App. Cas. 82, 92, 93, judgment of Privy Council. See *In re Kloebe* (1884), 28 Ch. D. 175, 179, judgment of Pearson, J.

At the present day, at any rate, our Courts would not expect that any foreign, *e.g.*, a colonial, Court should grant administration to the English administrator of a deceased person who did not die domiciled in England. See *Burn v. Cole* (1762), Ambl. 415, 416, language of Lord Mansfield, C. J.

(*y*) See Williams, *Executors* (11th ed.), pp. 267—269; *Ibid.*, 1271—1283; Westlake (5th ed.), ss. 95—103, pp. 130—137; Foote (4th ed.), pp. 271—280.

(*z*) For definition of "property," see Rule 75, p. 335, *ante*.

(*a*) Since the word "administrator" as here used includes an executor (see Rule 75, p. 335, *ante*), the term "passes" is not strictly correct; for the property of the deceased does not pass to the executor under the grant, but rather vests in him on the death of the testator (see p. 337, *ante*). Still, the language employed in the Rule is convenient and usual (compare Westlake, p. 130), and expresses what is meant, *viz.*, that certain property belongs to, and must be accounted for by, the administrator or executor who has obtained a grant.

of his death (*b*) is locally situate (*c*) in England (*d*).

(2) Any movables of the deceased, or the proceeds of any property of the deceased, which, though not situate in England at the time of the death of the deceased, are received, recovered, or otherwise reduced into possession by the English administrator as such administrator (*e*).

(3) Any movables of the deceased which after his death are brought into England before any person has, in a foreign country where they are situate, obtained a good title thereto under the law of such foreign country (*lex situs*) and reduced them into possession (*f*).

Comment.

All the property of the deceased, whether it consist of immovables (*g*) or of movables (*i.e.*, of land, goods, or choses in action), which at the time of his death (*h*) is locally situate (*i*) in England, passes to the English administrator, and this even though the property is not reduced into possession (*k*). Foreign lands or

(*b*) See Walker & Williams, p. 169.

(*c*) As to local situation of property, see pp. 342—347, *ante*.

(*d*) See *Attorney-General v. Dimond* (1831), 1 Cr. & J. 356, 370, judgment of Lyndhurst, O. B.

(*e*) See *Dowdale's Case* (1605), 6 Rep. 46 b, *nom. Richardson v. Dowdale*, Cro. Jac. 55; Westlake, p. 136; Foote, p. 280. See as to right of English administrator to receive or recover debts or other movables, Rule 85, p. 374, *ante*; *In re Scott*, [1916] 2 Ch. (C. A.) 268.

(*f*) See chap. xxiv., Rule 152, *post*, and cases there cited, especially *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545, judgment of North, J. Compare Westlake, p. 131; Story, s. 516; and *Whyte v. Rose* (1842), 3 Q. B. 493, 506, *dicta* of Rolfe, B., and Parke, B.

For rights further of an English administrator, as against personal property in England in the hands of a foreign personal representative, see chap. xviii., Rule 132, and comment, *post*; and as to the title of a foreign personal representative to movables of the deceased, *ibid.*, Rule 131, p. 489, *post*.

(*g*) See for a very limited and unimportant exception as to land which comes within the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1 (4).

(*h*) See Rule 76, p. 339, *ante*.

(*i*) As to the local situation of property for the purpose of administration, see pp. 342—347, *ante*.

(*k*) This seems to follow from the Land Transfer Act, 1897, s. 1, taken together with the rules as to the incidence of probate duty, and the rules as to

immovables, on the other hand, do not pass under the English grant.

An English administrator is apparently in some respects regarded by our Courts as the representative of the deceased (at any rate if he dies domiciled in England) as regards the whole of his movables. But it is certainly not the case that the whole of such movables, wherever situate, pass immediately to the English administrator under the grant.

In regard to the difficult question, what are the movables which do pass under an ordinary English grant, the following points may, it is submitted, though with some hesitation, be considered as pretty well established:—

(1) Any movable of the deceased, which at the time of his death (*l*) is locally situate in England, passes to the English administrator.

(2) When any movable (*m*) of the deceased is in fact received or recovered by the English administrator as such, it of course passes to him and forms part of the fund to be administered in England; and this is so whether the property is received, or recovered by action in England, or received, or recovered by action in a foreign country (*n*), provided always in the latter case that the property, *e.g.*, goods or debts, come into the hands of the administrator in his character of English administrator. This limitation should be noted, for movables, *e.g.*, goods or money, of which an English administrator gets possession in a foreign country, but not in his character of English administrator, do not pass to him under the grant. Thus, if the deceased dies domiciled in England and his English administrator obtains a grant in Victoria and there recovers debts due to the deceased, the amount recovered comes into his hands as Victorian administrator; he must administer it according to the law of Victoria (*o*), and the only portion which passes to him under the English grant is that

the jurisdiction of the Ecclesiastical Courts, on which the incidence to probate duty originally depended. (See pp. 346, 347, *ante*.) See *Attorney-General v. Dimond* (1831), 1 Cr. & J. 356, 370, judgment of Lyndhurst, C. B.

(*l*) See Rule 87 (1).

(*m*) See Rule 87 (2).

(*n*) *Dowdale's Case* (1605), 6 Rep. 46 b, *nom. Richardson v. Dowdale*, Cro. Jac. 55; *Atkins v. Smith* (1740), 2 Atk. 63. Compare, as to the general effect of an English grant, *Stirling-Maxwell v. Cartwright* (1879), 11 Ch. D. (C. A.) 522; *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; and consider especially, *Westlake*, s. 103, pp. 135, 136, compared with *Story*, s. 514 a.

(*o*) See chap. xxx., Rule 191, *post*.

part (if any) which under Victorian law comes to or remains in his hands for administration in England, *i.e.*, which he holds in his character of English administrator.

(3) Any goods of the deceased, *e.g.*, furniture or a watch, which are brought into England after his death, before any person has, under the law of a foreign country where they are situate, obtained a good title to them, pass to the English administrator; and goods which belong to the deceased, but which after his death have in a foreign country, in accordance with the laws thereof, passed to and come into the possession of another person, *e.g.*, a purchaser, certainly do not on coming to England become the property of the English administrator: The question requiring consideration is whether goods of the deceased to which another person has in a foreign country obtained a title, *e.g.*, as foreign personal representative, without having taken them into possession, pass, on arriving in England, to the English administrator (*p*)?

(4) In cases in which a foreign personal representative can be made accountable in England for property of deceased in his hands in England (*q*), such property is recoverable in England by, and constitutes assets in the hands of, the English administrator (*r*).

Illustrations.

In the following illustrations *N* is the deceased, *A* is the English administrator:—

1. *N* leaves freehold and leasehold property, and goods and bills payable to bearer, in England. They pass to *A*.

2. *N* leaves debts due to him from debtors resident in England. They pass to *A*.

3. *N* dies in a lodging at New York and leaves goods there. At *A*'s request the landlord of the house where *N* dies hands over the goods to *A* as *N*'s English administrator, and also pays *A* as such administrator 100*l.* due from the landlord to *N*. No representative of *N* has been constituted under the law of New York. *A* comes to England with the goods and money. The goods and the money pass to *A*.

(*p*) Compare Westlake, s. 95, p. 131, and see further on this point chap. xviii., comment on Rule 131, p. 489, *post*.

(*q*) See chap. xviii., Rule 132, *post*.

(*r*) See Westlake, ss. 99, 100, pp. 134, 135; *Lowe v. Fairlie* (1817), 2 Madd. 101; *Logan v. Fairlie* (1825), 2 S. & St. 284; *Sandilands v. Innes* (1829), 3 Sim. 263; *Tyler v. Bell* (1837), 2 My. & Cr. 89; *Bond v. Graham* (1842), 1 Hare, 482.

4. *A* recovers by action in England 100*l.* due to *N* from *X*, a debtor living in New York. The 100*l.* passes to *A*.

5. *N* dies leaving goods in New York. *B* takes out administration to *N* in New York, and, as New York administrator, takes possession of the goods. *B* at New York sells them to a purchaser who brings them to England. They do not pass to *A*.

6. *N* dies in New York leaving there a watch and jewels. *B* takes out letters of administration in New York to *N*. After *B* has taken out letters of administration to *N*, but before *B* has taken possession of the watch and jewels, *X*, the son of *N*, takes possession of them, and brings them to England. *Semble*, they pass to *A* (s)?

7. *N*, domiciled in England, dies intestate in New York, where he leaves goods. *B* obtains letters of administration to *N* from a Court of competent jurisdiction in New York. *B*, acting under the direction of such Court, hands over the goods of *N* at New York to *C*, as the person entitled to them in the judgment of such Court as *N*'s next of kin. *C* brings the goods to England. Whether the goods pass to *A*?

Extension of English Grant to Ireland and Scotland.

RULE 88 (t).—An English grant (u) will, on production of the said grant to, and deposition of a copy thereof

(s) See Westlake, s. 95, p. 131, and Foote (4th ed.), pp. 279, 280. "If property came to England after the death, would the foreign administration give a right to it?" *Whyte v. Rose* (1842), 3 Q. B. 493, 506, per Rolfe, B. "Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?" *Ibid.*, per Parke, B.

It may, however, be doubtful whether the goods have not become the goods of *B* before their arrival in England, and therefore whether they ought to pass to *A*.

(t) "From and after the [1st day of January, 1858], when any probate or letters of administration to be granted by the Court of Probate in England shall be produced to, and a copy thereof deposited with, the Registrars of the Court of Probate in Ireland, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and, being duly stamped, shall be of the like force and effect, and have the same operation in Ireland, as if it had been originally granted by the Court of Probate in Ireland." Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 94.

See, further, the Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), and the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), s. 41. Compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

(u) For meaning of "English grant," see Rule 75, p. 335, *ante*.

with, the proper officer of the High Court of Justice in Northern or Southern Ireland, be sealed with the seal of the said Court, and be of the like force and effect, and have the same operation in Northern or Southern Ireland, as a grant of probate or letters of administration made by the said Court (*x*).

The latter grant is hereinafter referred to as an Irish grant.

Comment.

An English grant may be extended to Northern or Southern Ireland under this Rule, whatever be the domicile of the deceased (*y*).

RULE 89 (*z*).—An English grant made to the administrator of any person duly stated to have died domiciled (*a*) in England will, on production of the said grant to, and deposition of a copy thereof with, the clerk of the Sheriff Court of the County of Edinburgh, be duly indorsed with the proper certificate by the said clerk, and thereupon have the same operation in Scotland as if a confirmation had been granted by the said Court.

(*x*) But note that the Land Transfer Act, 1897, does not extend to Ireland or to Scotland, or indeed to any other foreign country, *i.e.*, to any country except England. Compare s. 26 and the Land Transfer Act, 1875, s. 2.

(*y*) Contrast Rule 88 as to the extension of an English grant to Scotland.

(*z*) "From and after the date aforesaid [12th Nov. 1858], when any probate "or letters of administration to be granted by the Court of Probate in England "to the executor or administrator of a person who shall be therein, or, by any "note or memorandum written thereon signed by the proper officer, stated to "have died domiciled in England, or by the Court of Probate in Ireland to the "executor or administrator of a person who shall in like manner be stated to "have died domiciled in Ireland, shall be produced in the Commissary Court "of the County of Edinburgh, and a copy thereof deposited with the Commissary Clerk of the said Court, the Commissary Clerk shall indorse or write on "the back or face of such grant a certificate in the form, as near as may be, of "the Schedule (F) hereunto annexed; and such probate or letters of administration, being duly stamped, shall be of the like force and effect, and have the "same operation in Scotland, as if a confirmation had been granted by the said "Court." Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56), s. 14.

See, further, the Judicature Act, 1873 (36 & 37 Vict. c. 66), and the Sheriff Court (Scotland) Act, 1876 (39 & 40 Vict. c. 70), ss. 35, 41, and compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

(*a*) Contrast Rule 88, p. 381, *ante*, as to extension of English grant to Ireland.

Comment.

In accordance with this Rule, an English grant may, when the deceased dies domiciled in England, by formal proceedings, be extended to Scotland, so as to have there the operation of a "confirmation," which is the equivalent, under Scottish law, to a grant of probate or letters of administration.

The general effect of the Confirmation and Probate Act, 1858, on the fourteenth section of which (b) our Rule is grounded, has been thus stated:—

"The statute of 1858 was passed for the double object of
 "simplifying the procedure necessary, in Scotland for confirma-
 "tion, and in all parts of the United Kingdom for what it may be
 "convenient to call ancillary administrations; and of enabling, in
 "the latter class of cases, a single stamp, denoting the duty pay-
 "able on the aggregate value of the whole personal estate within
 "the United Kingdom, to be placed upon the principal grant,
 "whether of probate or administration in England or Ireland, or
 "of confirmation in Scotland; the latter object being purely fiscal.
 "For the purposes of that Act, *and for those purposes only* (as is
 "expressly provided by section 17), a statement of the domicile
 "of the deceased person in Scotland, or in England or Ireland, on
 "the face of any interlocutor of the Commissary Judge granting
 "confirmation, or of any probate or letters of administration
 "granted in England or Ireland, is made conclusive evidence, that
 "is, it is to determine conclusively which shall be deemed the
 "principal grant, on which the duty on the whole personal assets
 "within the United Kingdom is to be paid, and which is to be
 "followed, in the rest of the United Kingdom, by the procedure
 "substituted by the Act for that previously in use. The substi-
 "tuted procedure is the sealing or indorsement of the instrument
 "bearing the stamp on which the duty has been paid, by the
 "proper Court, in each of the other parts of the United Kingdom.
 "It is clear, that if, in any case, the domicile should happen to be
 "erroneously stated on the face of the instrument so sealed or in-
 "dorsed, all parties interested may assert their rights, and pursue
 "their remedies, in any forum which would have been competent
 "if that Act had never been made; nor is there anything to alter
 "or take away any such rights or remedies when the domicile is
 "correctly stated" (c).

(b) As modified by subsequent enactments.

(c) *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, 512, language of Lord Selborne.

RULE 90 (*d*).—Whenever the Colonial Probates Act, 1892, is by Order in Council applied to any British possession, *i.e.*, to any part of the British dominions not forming part of the United Kingdom, adequate provision is made for the recognition in that possession of an English grant.

Comment.

“Her Majesty the Queen may, on being satisfied that the legislature of any British possession [*i.e.*, any part of the British dominions (*e*) exclusive of the United Kingdom (*f*)] has made adequate provision for the recognition in that possession of probates and letters of administration [which terms include confirmation in Scotland] granted by the Courts of the United Kingdom, direct by Order in Council that this Act [*i.e.*, the Colonial Probates Act, 1892] shall, subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly” (*g*).

The effect of this enactment is that, whenever the Colonial Probates Act, 1892, which provides means for the recognition in the United Kingdom of probates and letters of administration

(*d*) 55 Vict. c. 6, s. 1, and Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18, sub-s. 2.

(*e*) For meaning of “British dominions,” see definitions, p. 68, *ante*.

(*f*) “The expression ‘British possession’ shall mean any part of Her Majesty’s dominions, exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.” Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18, sub-s. 2.

A central legislature in this definition means a legislature having power to deal with the subject-matter concerned; hence, as the Dominion Parliament in Canada and the Commonwealth Parliament in Australia have not authority in matters of probate, the Canadian Provinces and the Australian States are British possessions for the purpose of the Colonial Probates Act, 1892 (see s. 4). Indian probates are included, of course, within the operation of the Act in virtue of this definition, though British India is not a colony in the usual sense of the term (52 & 53 Vict. c. 63, s. 18), and probates granted by British Courts in foreign countries (*e.g.*, in protectorates) are included by virtue of s. 3 of the Act. (In *In re Tootal’s Trusts* (1883), 23 Ch. D. 532, the necessity of taking out probate in England in the case of a will proved in a consular Court was held not to exist, but this case must be regarded as wrongly decided on this point.)

(*g*) Colonial Probates Act, 1892 (55 Vict. c. 6), s. 1, with which read s. 6.

granted in British possessions (*h*), has been applied to a British possession, steps must also have been taken by the legislature of such British possession for the recognition there of probates and letters of administration granted by the Courts of the United Kingdom.

(*h*) See as to extension of a colonial or Indian grant to England, chap. xviii., Rule 135, p. 497, *post*.

PART II. (*a*).

JURISDICTION OF FOREIGN COURTS.

CHAPTER XII.

GENERAL RULES AS TO JURISDICTION.

RULE 91.—In this Digest

- (1) "Proper Court" means a Court which is authorised by the sovereign, under whose authority such Court acts, to adjudicate upon a given matter.
- (2) "Court of competent jurisdiction" means a Court acting under the authority of a sovereign of a country who, as the sovereign of such country, has, according to the principles maintained by English Courts, the right to adjudicate upon a given matter.

When in this Digest

- (i) it is stated that the Courts of a foreign country "have jurisdiction," it is meant that they are Courts of competent jurisdiction ;
- (ii) it is stated that the Courts of a foreign country "have no jurisdiction," it is meant that they are not Courts of competent jurisdiction.
- (3) "Foreign (*b*) judgment" means a judgment, decree, or order of the nature of a judgment

(*a*) See as to the aim of the Rules in Part II., pp. 212—214, *ante*.

(*b*) For the meaning of the word "foreign," see pp. 67, 71, *ante*.

(by whatever name it be called), which is pronounced or given by a foreign Court (c).

Comment.

(1) "*Proper Court*" and (2) "*Court of competent jurisdiction*" (d).

(1) The term "proper Court" has reference to the intra-territorial competence of a Court, and means a Court authorized by the law of the country to which the Court belongs, or, in strictness, by the sovereign under whose authority the Court acts, to adjudicate about a given matter. Thus, the Pennsylvanian Court of Common Pleas (e) is a "proper Court" for the purpose of divorcing persons resident, though not domiciled, in Pennsylvania, since the Court has under the law of Pennsylvania jurisdiction to divorce such persons. A proper Court is often designated, by English writers, a "Court of competent jurisdiction," but this is not the sense in which the expression "Court of competent jurisdiction" is used in this Digest.

(2) The term "Court of competent jurisdiction" refers, not to the intra-territorial, but to the extra-territorial (f) competence of a Court, or rather to the extent to which the competence of a Court is admitted in any country other than the country to which the Court belongs. When thus used, as it constantly is by English writers, the term means a Court acting under the authority of the sovereign of a country, who, as sovereign thereof, may rightly, according to the principles maintained by English law, determine or adjudicate upon a given matter. To put the same thing in other words, the term "Court of competent jurisdiction" means a Court belonging to a country the Courts whereof may rightly, according to the principles maintained by English Courts, determine or adjudicate upon a given matter. Thus, the Courts of a country where married persons, whether British subjects or not,

(c) This definition or description is suggested by Piggott (3rd ed.), pp. 5, 6; but it is not meant to include, as does his definition, an adjudication of bankruptcy or a grant of administration. He, moreover, confines his definition, to a judgment pronounced by a Court of competent jurisdiction, which we have purposely not done.

(d) See Intro., p. 40, note (c), *ante*. Compare *Turnbull v. Walker* (1892), 67 L. T. 767, 769, judgment of Wright, J.

(e) See *Green v. Green*, [1893] P. 89.

(f) This distinction is drawn in somewhat different language by Westlake. See Westlake (3rd ed.), pp. 347—349; and compare 5th ed., s. 319, pp. 399—401; and 2 Bishop, *Marriage and Divorce*, sects. 4—13.

are domiciled are Courts of competent jurisdiction to divorce such persons, since, according to the principles maintained by English tribunals, the Courts of the country where persons are domiciled, or rather the sovereign of such country acting through his Courts, may rightly divorce such persons (*g*). This is the sense in which the term "Court of competent jurisdiction" is used in this Digest.

The words in Rule 91, "as the sovereign of such country," are added to meet the case of countries, such as Scotland or Ireland, which are separate "countries" though forming part of one "State" (*h*). When our judges decide that the Court of Session is not a Court of competent jurisdiction for the divorce of persons domiciled in England, they of course do not decide that the sovereign of the United Kingdom has not a right to divorce such persons. What they do decide is that, according to the principles of English law, the sovereign of the United Kingdom has not, in the character of sovereign of Scotland and acting through the Scottish Courts, authority to grant a divorce to persons domiciled in England (*i*).

(A) WHERE JURISDICTION DOES NOT EXIST.

(i) *In Respect of Persons.*

RULE 92.—The Courts of a foreign country have no jurisdiction over, *i.e.*, are not Courts of competent jurisdiction as against—

- (1) any sovereign,
- (2) any ambassador, or other diplomatic agent, accredited to the sovereign of such foreign country (*k*).

(*g*) *Harvey v. Farnie* (1882), 8 App. Cas. 43. Compare chap. vii., Rule 62, p. 285, *ante*, and chap. xv., Rule 98, p. 416, *post*, and Intro., pp. 40—44, *ante*.

(*h*) As to the meaning of these terms, see pp. 69—71, *ante*.

(*i*) A judgment, be it noted, given by a foreign Court of undoubtedly competent jurisdiction, may yet not be enforceable or have effect in England (see chap. xvii., Rules 105—107, *post*); and, on the other hand, a judgment given by a foreign Court, which is not a proper Court, but is a Court of competent jurisdiction, may (*seem*) be enforceable or have effect in England. See Rule 104, p. 430, *post*, and *Vanquelin v. Bouard* (1863), 15 C. B. (N. S.) 341; 33 L. J. C. P. 78.

The question, further, when it comes before English judges, whether a foreign (*e.g.*, a French) Court is a Court of competent jurisdiction, is in reality always the question whether the French Courts are Courts of competent jurisdiction.

(*k*) See Hall, *International Law* (7th ed.), pp. 179—191.

Comment.

(1) *As to a sovereign*.—"A sovereign, while within foreign territory, possesses immunity from all local jurisdiction in so far and for so long as he is there in his capacity of a sovereign. He cannot be proceeded against either in ordinary or extraordinary . . . tribunals" (*l*). This principle, which is rigidly maintained by English Courts as regards their own jurisdiction (*m*), would doubtless be maintained by them as regards the jurisdiction of a foreign Court over any sovereign (*n*).

(2) *As to diplomatic agents*.—"The immunities from civil jurisdiction possessed by a diplomatic agent [according to the rules of international law], though up to a certain point they are open to no question, are not altogether ascertained with thorough clearness" (*o*).

The question, moreover, how far an English Court would admit the competence of a foreign Court to entertain an action for breach of contract or for tort against a diplomatic agent accredited to the sovereign of the foreign country has never, it is believed, called for decision by any English tribunal, but should the question come before our Courts they would (it is submitted) certainly hold that, except through the consent of the sovereign of such agent, the foreign Court could have no jurisdiction.

(ii) *In Respect of Subject-Matter.*

RULE 93 (*p*).—The Courts of a foreign country have no jurisdiction—

(1) to adjudicate upon the title, or the right to the

(*l*) Hall, p. 179.

(*m*) See Rule 52, p. 215, *ante*.

(*n*) The right of a foreign (*e.g.*, a French) Court to entertain an action against a sovereign, *e.g.*, the King of Italy, could hardly call for decision in England, since, even were a judgment against such king obtained in France, it is certain that no action could be brought against him on the judgment in England. An English Court might, however, be called upon indirectly to determine whether a foreign Court was competent to entertain proceedings against the property of a foreign sovereign. If a case such as that of *The Constitution* (1879), 4 P. D. 39, or *The Parlement Belge* (1880), 5 P. D. (C. A.) 197, were to come before a French Court, and judgment were given by the French Court against the ship, an English Court might, on the ship coming into an English port, be called upon to determine what, if any, was the effect in England of the French judgment. If such a case should require decision, our Courts would, it is submitted, hold that the French Court was not a Court of competent jurisdiction, and that the judgment had no effect in England. But see Rule 109, Exception, p. 442, *post*.

(*o*) Hall, p. 181.

(*p*) See Piggott (3rd ed.), p. 264; Story, s. 591.

possession, of any immovable not situate in such country, or

[(2) (*semble*) to give redress for any injury in respect of any immovable not situate in such country (?)].

Comment.

As to clause 1.—"If the matter in controversy is land, or other "immovable property," writes Story, "the judgment pronounced "in the *forum rei sitæ* is held to be of universal obligation, as to "all the matters of right and title which it professes to decide in "relation thereto. This results from the very nature of the case, "for no other Court can have a competent jurisdiction to inquire "into or settle such right or title. By the general consent of "nations, therefore, in cases of immovables, the judgment of the "*forum rei sitæ* is held absolutely conclusive. '*Immobilia ejus* "*'jurisdictionis esse reputantur, ubi sita sunt.'* On the other "hand, a judgment in any foreign country, touching such im- "movables, will be held of no obligation" (*q*).

The undoubted rule, in short, is that, if a Court pronounces a judgment affecting land out of its jurisdiction, the Courts of the country where it is situated—and, it is presumed, also the Courts of any other country—are justified in refusing to be bound by it, or to recognise it; and this even if the judgment proceed on the *lex loci rei sitæ* (*r*).

This rule is merely an application of the more general principle that no Court ought to give a judgment the enforcement whereof lies beyond the Court's power, and especially if it would bring the Court into conflict with the admitted authority of a foreign sovereign, or, what is the same thing, the jurisdiction of a foreign Court (*s*). English Courts, therefore, do not admit the jurisdiction of any foreign Court, *e.g.*, an Irish or a French Court, to determine a person's title, under a will or otherwise, to English immovables, in which term must be included leasehold (*t*) no less than freehold property.

(*q*) Story, s. 591.

(*r*) Piggott (3rd ed.), p. 264.

(*s*) See Intro., pp. 40—43, *ante*.

(*t*) Compare *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123.

As to clause 2.—A question might be raised how far a foreign tribunal would be held by English Courts competent to entertain an action for injuries, *e.g.*, trespass, in respect of land in England. As our Courts do not entertain actions for trespass to foreign land (*u*), it is probable that they would deny the competence of a foreign Court to give damages for trespass to land in England, or for trespass to land in any foreign country to which the Court did not belong.

Illustrations.

1. *T*, by his will duly executed in 1842, devised all his real and personal estate to *A*. He had real estate in Ireland and also in England. The Irish Courts, it was held, had no jurisdiction to adjudicate upon the validity of the will as relates to the real estate in England; and a decree of the Irish Court of Chancery in 1852, after verdict upon an issue *devisavit vel non*, did not determine the validity or invalidity of the will so far as it related to lands in England, and could not be pleaded in bar to a suit in the English Court of Chancery (*x*).

2. *T*, domiciled in Ireland, leaves a will devising the whole of his real and personal estate to *A*. *T* dies possessed of lands both in Ireland and in England. The Probate Division of the Irish High Court has no jurisdiction to grant probate or make a decree under 20 & 21 Vict. c. 79, ss. 65—67, so as directly (*y*) to affect the rights of persons interested in the land in England.

(*u*) *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602. See Rule 53, p. 223, *ante*.

(*x*) *Boyse v. Colclough* (1854), 1 K. & J. 124.

(*y*) Whether, owing to the effect of 20 & 21 Vict. c. 79, s. 95 (Rule 133, *post*), taken together with the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 1, which vests English land in the personal representative of the deceased, an Irish grant, sealed and extended to England, may by possibility affect indirectly the title to English land, whether personal or real estate? A similar question applies to a Scottish confirmation extended to England under 21 & 22 Vict. c. 26, s. 12 (Rule 134, *post*), and to a colonial or Indian grant, sealed and extended to England under 55 Vict. c. 6, s. 2, sub-ss. 1, 2 (Rule 135, *post*).

(B) WHERE JURISDICTION DOES EXIST.

RULE 94.—Subject to Rules 92 and 93, the Courts of a foreign country have jurisdiction (*i.e.*, are Courts of competent jurisdiction)—

- (1) in an action or proceeding (*z*) *in personam* (*a*);
- (2) in an action or proceeding *in rem* (*b*);
- (3) in matters of divorce, or having reference to the validity of a marriage (*c*);
- (4) in matters of administration and succession (*d*), to the extent, and subject to the limitations, hereinafter stated in the Rules having reference to each kind of jurisdiction.

(*z*) "Or proceeding" is added to cover any proceeding of the nature of an action.

(*a*) See chap. xiii., Rules 95, 96, *post*.

(*b*) See chap. xiv., Rule 97, *post*.

(*c*) See chap. xv., Rules 98—100, *post*.

(*d*) See chap. xvi., Rules 101, 102, *post*.

CHAPTER XIII.

JURISDICTION IN ACTIONS *IN PERSONAM* (a).

RULE 95.—In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases:—

First Case.—Where at the time of the commencement of the action the defendant was resident [or present? (b)] in such country, so as to have the benefit, and be under the protection, of the laws thereof (c).

Second Case.—Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country (d) (?)

Third Case.—Where the party objecting to the jurisdiction of the Courts of such country has, by his own conduct, submitted to such jurisdiction, *i.e.*, has precluded himself from objecting thereto (e)—

(a) by appearing as plaintiff (f) in the action, or

(a) Story, ss. 538—543, 546—549; Westlake, chap. xvii.; Foote (4th ed.), pp. 515—520. See Intro., General Principle No. III., p. 40; and pp. 47—51, *ante*. Compare Rule 96, p. 408, *post*.

(b) *Carrick v. Hancock* (1895), 12 T. L. R. 59.

(c) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371. Compare *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; *Jaffer v. Williams* (1908), 25 T. L. R. 12.

(d) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Douglas v. Forrest* (1828), 4 Bing. 686.

(e) See Westlake (5th ed.), ss. 325—327; Foote (4th ed.), pp. 517—520; *Guiard v. De Clermont*, [1914] 3 K. B. 145; *Jeannot v. Fuerst* (1909), 25 T. L. R. 424; *Hayris v. Taylor*, [1915] 2 K. B. (C. A.) 580.

(f) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161.

- (b) by voluntarily appearing as defendant(*g*) in such action, or
- (c) by having expressly or impliedly contracted (*h*) to submit to the jurisdiction of such Courts.

Comment and Illustrations.

(A) General Principles.

First. The authority of the English Courts to entertain proceedings *in personam* against a defendant has, until quite modern times, been based in substance solely on the presence in England of the defendant at the commencement of the proceedings (*i*). No question, therefore, has until recently arisen as to how far the jurisdiction *in personam* of our tribunals might or might not be affected by circumstances other than the defendant's presence in England, as, for example, by his place of residence or domicile, by his nationality or allegiance, by the place where a cause of action arose, or by the defendant's possession of property in England. These matters being irrelevant as regarded the jurisdiction exercisable by English judges, our Courts have never till recently been called upon to form for their own use a general theory as to jurisdiction. Hence, when they have been compelled to consider the

(*g*) *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39, 42; *Molony v. Gibbons* (1810), 2 Camp. 502.

(*h*) *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17; *Vallée v. Dumergue* (1849), 4 Ex. 290; 18 L. J. Ex. 398; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Meeus v. Thellusson* (1853), 8 Ex. 638; 22 L. J. Ex. 239; *Kelsall v. Marshall* (1856), 1 C. B. (N. S.) 241; 26 L. J. C. P. 19. *Conf. Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302; *Jeannot v. Fuerst* (1909), 25 T. L. R. 424.

(*i*) The jurisdiction of the Superior Courts of Common Law and of Equity depended substantially upon the king's writ being served upon the defendant. A writ could always be served on any defendant who was in England; and if some special cases be set aside in which the Court of Chancery allowed a writ of subpoena out of England, a writ could not be served on any defendant who was out of England. Hence the presence of a defendant in England was in effect the basis of the jurisdiction exercisable by our Courts. See, as to Chancery procedure generally, 1 Spence (1st ed.), p. 367; and as to service of a writ of subpoena out of England, 2 Spence, p. 7, note (*a*), and General Orders of May 8, 1845, rule 32. It has only been of quite recent times that under statutory authority the service of a writ of summons out of England has been allowed, and the jurisdiction of the English Courts in actions *in personam* been extended to defendants who are out of England. See pp. 250—278, *ante*.

effect which ought to be given to foreign judgments, they have shown an inclination to elude the necessity for formulating any general doctrine as to the principles which ought to regulate the exercise of jurisdiction by foreign Courts (*k*), and have, where it was possible, tried to determine each case more or less in reference to its special circumstances.

An indication of the trend of opinion on the subject is afforded by the enumeration in the Administration of Justice Act, 1920 (*l*), of the cases in which registration, with a view to execution in England, of a judgment *in personam*, rendered by a Court of a British possession, should not be permitted. But it must be remembered that the Legislature in that Act is dealing with the special arrangements proper within the British Empire, which may not necessarily be applicable to foreign countries in the ordinary sense of that term (*i.e.*, to countries which are not within the British Empire), and that the Act is concerned only with cases in which registration should be or should not be permitted, and that there may be cases in which, while registration of the judgment would not be allowed, an action on the judgment could nonetheless successfully be brought. It is, therefore, impossible to derive from that enactment any very precise light on the questions dealt with in this chapter.

Secondly. In the vast majority of the reported cases which have reference to the jurisdiction of foreign Courts, the matter calling for determination has been how far a judgment given against a defendant in proceedings abroad can be enforced against him in England by means of an action. The question, therefore, raised, in so far as it really referred to the competence of the foreign tribunal, has been whether it was or was not the "duty" (*m*) of the defendant to obey the judgment of the foreign Court, or (what is the same thing) the command of the sovereign under whose authority the Court acted; and the answer to this inquiry has been judicially given in the form of a more or less complete enumeration of the cases in which a party to an action abroad is bound to obey the judgment of the foreign Court, or the commands of the foreign sovereign. It will be observed that the judgments or judicial *dicta* on this subject which are here cited mainly refer to the case of a defendant; but in principle they are clearly applicable to any person against whom a Court

(*k*) See Westlake (5th ed.), p. 400; Story, ss. 610, 531, 537—540, 546—549.

(*l*) 10 & 11 Geo. 5, c. 81, Part II. See Rule 117, p. 462, *post*.

(*m*) See Intro., p. 51, *ante*.

pronounces judgment in an action *in personam*. There is, however, little need to particularise the various circumstances, such, for example, as residence or allegiance, which might conceivably make it the duty of a plaintiff to obey the judgment of the foreign Court; for by the mere bringing of the action he has submitted himself to the jurisdiction of the Court, and in fairness to the defendant, if for no other reason, is bound to submit to the judgment of the tribunal to which he has himself appealed.

If the attitude of English judges with regard to questions of jurisdiction be borne in mind, the principles, which in their view ought, as regards actions *in personam*, to determine whether the Courts of a foreign country are in a given case Courts of competent jurisdiction, may be gathered from the following statements taken from well-known judgments.

“The true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smyth* (n), and again repeated by him in *Williams v. Jones* (o), that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action” (p).

“We think some things are quite clear on principle. If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them. . . . (q). But [each of these] suppositions is negated in the present case.

“Again, we think it clear, upon principle, that if a person

(n) 9 M. & W. at p. 819.

(o) 13 M. & W. at p. 633.

(p) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 159.

(q) The words omitted contain the suggestion that the presence of the defendant in a foreign country at the time when the obligation in respect of which the action is brought was there contracted may give the Courts thereof jurisdiction. But see *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; and Rule 96, p. 408, *post*.

“selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him” (r).

This doctrine is slightly expanded in a later judgment delivered by Fry, L. J.

“Then arises the question how far the defendant is bound by [the foreign judgment], and the law upon this point, I think, I may conveniently take from the case of *Schibsby v. Westenholz* (s), which has been so much discussed in the course of the argument. In that case the Court considered the principles on which foreign judgments are enforced by Courts of this country, and they said (t): ‘We think, for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B., in *Russell v. Smyth* (u), and again repeated by him in *Williams v. Jones* (x), that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.’ What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case, and to *Copin v. Adamson* (y), they may, I think, be stated thus. The Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly, if *Becquet v. MacCarthy* (z) be right, where the defendant has

(r) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161, per Blackburn, J.; *Turnbull v. Walker* (1892), 67 L. T. 767.

(s) L. R. 6 Q. B. 155.

(t) *Ibid.* 159.

(u) 9 M. & W. 810, 819.

(x) 13 M. & W. 628, 633.

(y) L. R. 9 Ex. 345.

(z) 2 B. & Ad. 951. But whether this case has reference to the possession of real property by the defendant as a ground of jurisdiction? This query has received judicial approval. See *Emanuel v. Symon*, [1908] 1 K. B. (C. A.)

“real estate within the foreign jurisdiction, in respect of which
 “the cause of action arose whilst he was within that juris-
 “diction” (a).

“All jurisdiction is properly territorial, and ‘*extra territorium*
 “‘*jus dicenti, impune non paretur.*’ Territorial jurisdiction
 “attaches (with special exceptions) upon all persons either perma-
 “nently or temporarily resident within the territory while they
 “are within it; but it does not follow them after they have with-
 “drawn from it, and when they are living in another independent
 “country. It exists always as to land within the territory, and
 “it may be exercised over movables within the territory; and, in
 “questions of status or succession governed by domicile, it may
 “exist as to persons domiciled, or who when living were domiciled,
 “within the territory. As between different provinces under one
 “sovereignty (e.g., under the Roman Empire) the legislation of
 “the sovereign may distribute and regulate jurisdiction; but no
 “territorial legislation can give jurisdiction which any foreign
 “Court ought to recognise against foreigners, who owe no allegi-
 “ance or obedience to the power which so legislates.

“In a personal action, to which none of these causes of juris-
 “diction apply, a decree pronounced *in absentem* by a foreign
 “Court, to the jurisdiction of which the defendant has not in
 “any way submitted himself, is by international law an absolute
 “nullity. He is under no obligation of any kind to obey it; and
 “it must be regarded as a mere nullity by the Courts of every
 “nation, except (when authorised by special local legislation) in
 “the country of the forum by which it was pronounced” (b).

(B) *The Three Special Cases.*

The circumstances under which, according to the judgments in
Schibsby v. Westenholz (c), and *Rousillon v. Rousillon* (d), taken
 together with the judgment of the Privy Council in *Sirdar*

302, 310, judgment of Buckley, L. J. In other words, *Becquet v. MacCarthy*
 cannot now be treated as an authority for the doctrine that where a defendant
 has immovable property in a foreign country in respect of which the cause of
 action has arisen, the Courts thereof have jurisdiction over him. See also
 Rules 96 and 116, pp. 408, 458, *post*.

(a) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 370, 371, per Fry, J.;
Feyerick v. Hubbard (1902), 71 L. J. K. B. 509.

(b) *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 683, 684,
 judgment of P. C. Followed in *Jaffer v. Williams* (1908), 25 T. L. R. 12.

(c) (1870), L. R. 6 Q. B. 155. See pp. 396, 397, *ante*.

(d) (1880), 14 Ch. D. 351.

Gurdial Singh v. Rajah of Faridkote (e), a person is bound to obey the judgment of a foreign Court, correspond with, or are in fact restated in, the three cases in which, under Rule 95, the Courts of a foreign country have jurisdiction.

These three Cases are applications of two principles explained and discussed in the Introduction to this work (f). The first and second Cases are clearly covered by the "principle of effectiveness." The third Case is with equal clearness covered by the "principle of submission."

The list given in this Rule of the cases in which foreign Courts are, or may be, Courts of competent jurisdiction is not necessarily exhaustive. The law on the authority to be ascribed to the decisions of foreign tribunals is still uncertain, and still liable to undergo further development by means of judicial legislation. It is impossible, therefore, to assert with confidence that the jurisdiction of foreign Courts is in the opinion of English judges absolutely confined to the Cases enumerated in Rule 95.

Each of the three Cases admits of and will receive comment and Illustration, and, it is hoped, will be made more fully intelligible by such illustrative examples.

First Case. Residence (g).—The *residence* of a defendant in a country at the time when an action is commenced against him is an admitted ground of jurisdiction. "If the defendants had been," it is said by the Court in *Schibsby v. Westenholz*, "at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them" (h).

As the *presence* of a defendant in England at the time of the service of the writ was the sole foundation of the jurisdiction of the English Courts, they could hardly decline to hold that the *residence* of a defendant in a foreign country gave jurisdiction to the Courts thereof.

Two questions may, however, be raised on this point.

First Question.—Is *residence*, in the strict sense of the term, necessary, or will the mere presence of the defendant in the foreign

(e) [1894] A. C. 670.

(f) Viz.: General Principle No. III., Intro., p. 40, *ante*, and General Principle No. IV., Intro., p. 44, *ante*.

(g) See Rule 95, *First Case*.

(h) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161, *per Curiam*.

country, *e.g.*, France, be enough to give the French Courts jurisdiction? The answer is that his *presence* is enough, or in other words, that residence means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ, or other process by which the action is commenced (*i*).

The Lord Chief Justice (Lord Russell of Killowen) observed, "that the jurisdiction of a Court was based upon the principle of territorial dominion, and that all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws, and to the lawful jurisdiction of its Courts. In his opinion, that duty of allegiance was correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depended upon the fact of the person being within its territory. It seemed to him that the question of the time [during which] the person was actually in the territory was wholly immaterial" (*k*).

Illustrations.

1. X is an Englishman living in France at the time when an action is commenced there against him. The French Courts have jurisdiction over X (*l*).

2. X is an English traveller, staying for a few days at an hotel in Massachusetts. Whilst he is there a writ is issued and served upon him requiring him to appear as defendant in an action brought against him in a Massachusetts Court. The Massachusetts Court has jurisdiction.

3. The circumstances are the same as in Illustration 2, except that the writ is issued a day or two before X arrives in Massachusetts. The Massachusetts Court has (*semble*) jurisdiction (*m*).

(*i*) *Carrick v. Hancock* (1895), 12 T. L. R. 59. See Rule 59, p. 241, *ante*.

(*k*) *Ibid.*, 59, 60.

(*l*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155. As to how far want of notice may be an answer to an action on a judgment, see Rule 107, p. 440, *post*.

(*m*) See, in favour of jurisdiction, *i.e.*, in favour of the Massachusetts Court being held in England a Court of competent jurisdiction, *Carrick v. Hancock* (1895), 12 T. L. R. 59; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670. But on the other hand, note that if the issue of the writ is to be taken to be the commencement of the action, X is not in Massachusetts at the time when the action commences, and therefore does not come precisely within any of the cases cited. In *Carrick v. Hancock* it does not appear at what point the action commenced.

Second Question.—Is the *domicil* of the defendant, as contrasted with and in the absence of residence, sufficient to give a foreign Court jurisdiction? This question must (it is submitted) be answered in the negative (*n*).

Illustration.

X is a British subject residing in England, but domiciled in France. An action is brought against him in Paris. He is served with process or notice of process in England. The French Court has (*semble*) no jurisdiction.

Second Case. Allegiance (o).—"The Courts of this country "consider the defendant bound where he is a *subject (p)* of the "foreign country in which the judgment [against him] has been "obtained" (*q*). Allegiance, that is to say, is, independent of residence, a ground of jurisdiction. The reason of this is that a subject is bound to obey the commands of his sovereign, and, therefore, the judgments of his sovereign's Courts. The allegiance must, it would seem, exist at the time not when the action is commenced, but when the judgment is given (*r*). And a nice question of jurisdiction might arise, supposing a defendant to have changed his allegiance after the commencement of an action against him.

The doctrine, however, that allegiance is sufficient to give jurisdiction, though supported by judicial dicta, cannot be established by any reported decision. In *Douglas v. Forrest (s)*, which goes near to a decision on this point, the Court dwell on the fact of the defendant having at the time of the judgment possessed property in Scotland. Moreover, the doctrine of allegiance as the foundation for jurisdiction is inapplicable to the British

(*n*) Note that English Courts do now, though this is a novelty, claim for themselves in some instances jurisdiction over a defendant in an action *in personam* simply on the ground of his domicil or ordinary residence in England. See Intro., pp. 43, 44, 52—55, *ante*; Ord. XI. r. 1 (*c*); Exception 3 to Rule 60, p. 258, *ante*.

(*o*) See Rule 95, *Second Case*, p. 393, *ante*.

(*p*) *Ibid*.

(*q*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371, judgment of Fry, J. See *Douglas v. Forrest* (1828), 4 Bing. 686.

(*r*) Compare *Schibbsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371; *Meek v. Wendt* (1888), 21 Q. B. D. 126, 130.

(*s*) (1828), 4 Bing. 686. See the criticism in *Gibson & Co. v. Gibson*, [1913] 3 K. B. 379, 390—392, per Atkin, J.

dominions, for allegiance is owed by every British subject to the British Crown, and English law does not recognize, *e.g.*, an Australian or even an English nationality as distinct from British nationality, so as to permit of jurisdiction founded on local allegiance (*t*).

Illustration.

X is a French citizen residing and domiciled in England. An action is brought against X in France. X, whilst residing in England, has actual notice of the action. Judgment is, in his absence, pronounced against X in France. The French Court (*semble*) has jurisdiction (*u*).

Third Case. Submission (x).—This case rests on the simple and universally admitted principle that a litigant who has voluntarily submitted himself to the jurisdiction of a Court cannot afterwards dispute its jurisdiction (*y*). The submission may take place in different ways, and may be made either by the party who is plaintiff or by the party who is defendant before the foreign Court (*z*).

Plaintiff. “We think it clear, upon principle, that if a person “selected, as plaintiff, the tribunal of a foreign country as the one “in which he would sue he could not afterwards say that the “judgment of that tribunal was not binding upon him” (*a*).

Illustration.

A, an Englishman residing in England, brings an action against X in France for the breach of a contract made and broken in England. The French Court gives judgment in X’s favour. The French Court has jurisdiction over A.

This is so clear that no further illustration is needed.

Defendant. A person who voluntarily appears as defendant in an action submits himself to the judgment of the Court so that he cannot afterwards dispute its jurisdiction. A submission is, however, held to be voluntary, not only when the defendant appears and pleads to the merits of the case without protesting against

(*t*) See *Gibson & Co. v. Gibson*, [1913] 3 K. B. 379; *In re Johnson*, [1903] 1 Ch. 821, 832, 833.

(*u*) Compare *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161.

(*x*) See Rule 95, *Third Case*, p. 393, *ante*.

(*y*) See Intro., p. 44, *ante*.

(*z*) See Rule 95, *Third Case*, (*a*), (*b*) and (*c*).

(*a*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 161. See Westlake (5th ed.), ss. 324, 325.

the jurisdiction, but also when, although protesting, he also pleads to the merits (*b*), and even if he merely appears in order to protest against the jurisdiction (*c*). The ground on which such an appearance as the last can be deemed voluntary is that there is no compulsion on a defendant to recognize in any way the jurisdiction of a Court which has not under the Rules dealt with in this Digest jurisdiction over him; if, therefore, he chooses to appear and to object to the jurisdiction of the Court, he involves himself in the necessity of submitting to that jurisdiction, if the plea to the jurisdiction should be disallowed by the Court. Nor does it make any difference what the motive of his appearance may be. An appearance is equally voluntary whether it be motivated by the fact that the defendant has property within the jurisdiction of the Court on which execution may be levied in the event of judgment going against him by default (*d*), or even by the fact that, though he has no property within the jurisdiction, his business often takes him within the jurisdiction so that the judgment of the Court might be made effective against him (*e*).

In one case only is it possible that appearance and pleading to the jurisdiction or the merits of both may not be held to involve a voluntary submission to the jurisdiction. There is authority (*f*) for the view that, if a defendant appears to defend an action solely in order to save property of his within the jurisdiction of the Court, which has been arrested or attached as a basis for jurisdiction, such an appearance will not be held to be voluntary. But the doctrine does not seem to have been the *ratio decidendi* of any reported case, and it must be regarded as doubtful whether the English Courts would now admit the existence of even this exception to the general principle (*g*).

(*b*) Compare *Boissière v. Brockner* (1889), 6 T. L. R. 85.

(*c*) The doctrine was laid down by Cave, J., in *Boissière v. Brockner* (1889), 6 T. L. R. 85, though that case might have been decided on the ground that, besides pleading to the jurisdiction, the defendant had pleaded to the merits. But it is definitely established in the widest sense by the unanimous decision of the Court of Appeal in *Harris v. Taylor*, [1915] 2 K. B. (C. A.) 580.

(*d*) *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L. J. Ex. 238.

(*e*) *Voinet v. Barrett* (1885), 55 L. J. Ch. (C. A.) 39.

(*f*) *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39, 41, judgment of Escher, M. R.; *Schibsby v. Westenholtz* (1870), L. R. 6 Q. B. 155, 162, per Lord Blackburn; *Guiard v. De Clermont*, [1914] 3 K. B. 145, 155.

(*g*) The fact that property has been seized in execution will not make an appearance to defend involuntary. *Guiard v. De Clermont*, [1914] 3 K. B. 145. Moreover, in *The Duplex*, [1912] P. 8, 11—15, following *The Dictator*, [1892] P. 304; *The Gemma*, [1899] P. (C. A.) 285, an appearance in an action *in rem*

Illustrations.

1. *A* brings an action in a French Court against *X*, an Englishman domiciled in England. *X* appears in France and defends the action, because his business transactions involve frequently his presence in France, so that judgment might be executed against him there. His appearance is voluntary, and the French Court has jurisdiction over him (*h*).

2. The circumstances are the same as in Illustration 1, but *X* has valuable property in France which might be seized in execution if the action were decided against him. The Court has jurisdiction (*i*).

3. The circumstances are the same as in Illustration 1, but, after judgment has been given by the French Court in default, *X* appears to have the case reopened, his motive being the arrest in execution of the judgment in default of a small balance lying to his credit in a French bank. The Court has jurisdiction (*k*).

4. *X* is an Englishman domiciled and resident in England. *A* brings an action against him in a foreign country for breach of contract, jurisdiction being founded on the arrest of property of *X* within that country. *X* appears in order to save his property. Whether the Court has jurisdiction (*l*)?

5. *A* brings an action against *X* in a Manx Court. *X* appears merely to dispute the jurisdiction. By reason of his appearance the Court has jurisdiction (*m*).

Contract to Submit.—The parties to a contract may make it one of the express (*n*) or implied (*o*) terms of the contract that

was held to subject the defendants, who contested liability for a collision, and counterclaimed for damage to their vessel, to liability *in personam* for the full amount of the damage and not merely for the value of the ship.

A defendant who pleads on an arrestment to found jurisdiction in Scotland is liable to have the judgment of the Court enforced against him under the Judgments Extension Act, 1868. See Rule 116, p. 458, *post*.

(*h*) *Voinet v. Barrett* (1885), 55 L. J. Q. B. (C. A.) 39.

(*i*) *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301.

(*k*) *Guiard v. De Clermont*, [1914] 3 K. B. 145.

(*l*) *Ibid.*, p. 155. In *The Challenge and Duc d'Aumale*, [1904] P. 41, it was held that the parties, whose ship had been arrested in Belgium as a step ancillary to proceedings in a French Court, and who had entered an appearance in the Belgian proceedings, had not thereby bound themselves to submit to the jurisdiction of the French Court. The decision would, it is clear, have been otherwise had the arrest taken place in France and the parties had appeared in the French proceedings. Compare Rule 97, p. 413, *post*.

(*m*) *Harris v. Taylor*, [1915] 2 K. B. (C. A.) 580.

(*n*) *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17; *Law v. Garrett* (1878), 8 Ch. D. (C. A.) 26.

(*o*) *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P.

they will submit in respect of any alleged breach thereof or any matter having relation thereto, to the jurisdiction of a foreign Court, and a person who has thus contracted is clearly bound by his own submission (*p*). All that need be further noted is, that under this head may be brought cases in which, from the nature of the contract, *e.g.*, possibly under peculiar circumstances an agreement with regard to foreign land (*q*), it may be presumed that the parties intended to submit to the jurisdiction of particular Courts, *viz.*, the Courts of the country where the land is situate.

Illustrations.

1. *A* is a Belgian firm carrying on business in Belgium. *X* is a British subject domiciled in England and resident in London; he enters into a contract to assign certain patent rights to *A* in Belgium. The contract provides (*inter alia*) that "all disputes "as to the present agreement and its fulfilment shall be submitted "to the Belgian jurisdiction." In an action by *A* against *X* brought in the proper Belgian Court for alleged breach of the contract, and in which, in accordance with the provisions of Belgian law, citation is duly served upon *X* in London, judgment is obtained for 1,000*l*. The Belgian Court has jurisdiction (*r*).

2. *X*, an Englishman, enters into a contract with *A* to trade in co-partnership in Russia. *X* resides in England. It is a term of the contract that all disputes, no matter how or where they arise, shall be referred to a Russian Court. Disputes arise concerning the terms of the partnership. *A* brings an action against *X*, in a Russian Court, for alleged breach of the contract. The Russian Court has jurisdiction (*s*).

3. *X* is an Englishman, resident and domiciled in England, and

345; *Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 284; 16 Q. B. 717; *Vallée v. Dumergue* (1849), 4 Ex. 290; 18 L. J. Ex. 398.

(*p*) *Nelson*, p. 363. See *Law v. Garrett* (1878), 8 Ch. D. (C. A.) 26.

(*q*) But see Rule 96, p. 408, *post*; and compare *British Wagon Co. v. Gray*, [1896] 1 Q. B. (C. A.) 35, decided with reference to Ord. XI. r. 1 (*e*); and *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302, reversing judgment of Court below, [1907] 1 K. B. 235.

(*r*) *Feyerick v. Hubbard* (1902), 71 L. J. K. B. 509. This case follows, and, perhaps, slightly extends, *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Jeannot v. Fuerst* (1909), 25 T. L. R. 424.

(*s*) See *Law v. Garrett* (1878), 8 Ch. D. (C. A.) 26. This case does not directly raise the question of jurisdiction, but implies that the agreement gave jurisdiction to the Russian Court. Compare *Kirchner & Co. v. Gruban*, [1909] 1 Ch. 413.

not a native or citizen of France. He holds shares in a French company. *X* thereby becomes, under the law of France, subject to all the conditions contained in the statutes of the company. Under these statutes every shareholder is compelled to elect a domicile in France, and, as to all disputes which may arise during the liquidation of the company, is subject to a French tribunal. The company goes into liquidation, and *A* brings an action in France against *X* for the amount not paid up on *X*'s shares. Notice is duly served on *X*, at his elected domicile, though *X* has no knowledge of the statutes of the company or their provisions. *A* recovers judgment against *X*. The French Court has jurisdiction (*t*).

4. *X*, an Englishman residing in England, is a member of an Australian company. A colonial Act enables the chairman of the company to sue and be sued for the company, and provides that he is to be taken as agent for the members of the company. An action is brought, and judgment recovered, in Australia, against the chairman by *A*; *i.e.*, in effect, an action is brought, and judgment recovered, against *X*; he has no notice of the proceedings against the chairman. The Australian Court has jurisdiction against *X* (*u*).

5. *X*, a British subject, when residing and carrying on business in Western Australia, enters into partnership there with *A* for the working of a gold mine situate in Western Australia. The venture is not successful. There is a dissolution of partnership and under a decree of an Australian Court accounts are taken showing a deficiency, in respect of which a suit is brought in the Australian Court against *X*, and judgment given for 1,000*l*. *X* is not in Western Australia at the commencement of the suit nor at any time during its continuance; nor is he at any time resident or domiciled there. He does not appear to the writ issued in the Australian suit, nor does he agree to submit to the jurisdiction of the Court of Western Australia. The writ is served upon him in England, and he is kept informed of the proceedings

(*t*) *Copin v. Adamson* (1875), 1 Ex. D. (C. A.) 17. Compare the fuller report of the proceedings in the Court below (1874), L. R. 9 Ex. 345. See also *Vallée v. Dumergue* (1849), 4 Ex. 290; 18 L. J. Ex. 398.

(*u*) *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345. See also *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; 20 L. J. Q. B. 284. The result is that an action can be maintained in England against *X*, on the Australian judgment, given nominally against the chairman. See "Effect of Foreign Judgments," chap. xvii.

in Western Australia. The Western Australian Court has no jurisdiction (*x*).

6. *X*, an Englishman resident and domiciled in England, is the tenant of land in France. *X* is sued in a French Court by his landlord, *A*, for rent due from *X*. Constructive notice is given to *X* in accordance with the provisions of French law, but he has no other notice of the proceedings and does not appear to defend the action. The French Court (*semble*) has no jurisdiction (*y*).

It is worth while, after carefully considering each of the three Cases which make up Rule 95, to reflect upon one or two results which are suggested as to the whole character of the Rule itself. It becomes, in the first place, obvious that the main principle recognized by English Courts with regard to the jurisdiction of the High Court, or of foreign Courts, at any rate in actions *in personam*, is that the Courts of a country where a defendant is present, *i.e.*, where he can be served with a writ, have in general jurisdiction over him (*z*), and that it is extremely doubtful whether in practice and in such an action English Courts really recognize, even in the case of foreign Courts, allegiance as a basis of jurisdiction. It is, further, obvious that English Courts are ready to recognize with ease in an action *in personam* submission by a plaintiff or a defendant to the High Court or to a foreign Court, as a valid ground of jurisdiction. It also becomes obvious that the High Court must in the long run concede to the Courts of foreign countries pretty much the same rights of jurisdiction which it claims for itself. A question, therefore, arises, what will be the direction in which the High Court is likely to meet the obvious difficulty arising from the fact that in actions *in personam* neither allegiance nor domicile is at all unreservedly recognized as giving jurisdiction to the Courts of a foreign country, *e.g.*, to the Courts of Scotland, of New Zealand, or of Italy. It has been plausibly suggested that domicile (*a*) should even in actions *in personam* be admitted in the case of such foreign countries to give jurisdiction to the Courts thereof; and this would certainly, especially as a

(*x*) *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302.

(*y*) See p. 405, *ante*, and p. 408, *post*.

(*z*) See Rule 95, *First Case*, p. 393, *ante*.

(*a*) Dicta which suggest the recognition of domicile are found in *Jaffer v. Williams* (1908), 25 T. L. R. 12; *Gibson & Co. v. Gibson*, [1913] 3 K. B. 379; *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302; *Turnbull v. Walker* (1892), 67 L. T. 767, 769. Jurisdiction on the ground of domicile only is not claimed by the Scottish Courts. *Corporation of Glasgow v. Johnston*, [1915] S. C. 555; *Maclaren*, Court of Session Practice, p. 35.

convenient mode of strengthening the relation between England and such a country as New Zealand, be a great improvement on the attempt to rely on the allegiance of a party to an action as the foundation of the jurisdiction of the Courts of New Zealand. But, if we observe with care the course which the High Court has in fact pursued when determining the circumstances which govern the jurisdiction of foreign Courts, one may with confidence conclude that it will extend such jurisdiction in two directions, neither of which is connected with domicile. The Court will probably extend to the utmost the doctrine that a person living in a country which, like France or New Zealand, has a distinct legal system of its own, is by his mere presence in such country, *e.g.*, New Zealand, subject to the jurisdiction of the Courts thereof, and hold, with Lord Russell of Killowen, that the time during which he is so subject to the authority of the New Zealand Government, however short it be, places him, at any rate on the service upon him of a writ, within the jurisdiction of the Courts of New Zealand. The High Court will again almost certainly extend to the Courts of every foreign country the principle of submission, and render any person who directly or indirectly, openly or impliedly, submits to the Courts of New Zealand, thereby subject to the jurisdiction of such Courts (*b*).

Further, if the interpretation given below of the provisions of the Administration of Justice Act, 1920 (*c*), is correct, it would seem that in the case of judgments given in British possessions at least the Court will recognize jurisdiction exercised upon an absent defendant, provided that (1) he is ordinarily resident or carrying on business within the possession, and (2) he is duly served with the process of the Court.

RULE 96 (*d*).—In an action *in personam* the Courts of a foreign country do not acquire jurisdiction either—

- (1) from the mere possession by the defendant at the commencement of the action of property locally situate in that country (*e*), or

(*b*) See Ord. XI. r. 2 (*a*); Rule 60, Exception 10, p. 272, *ante*.

(*c*) 10 & 11 Geo. 5, c. 81, s. 9 (2) (*c*). See p. 464, *post*.

(*d*) As to clause 1, see *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; as to clause 2, *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685, 686, judgment of P. C., with which contrast *Becquet v. MacCarthy* (1831), 2 B. & Ad. 951, and judgment in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, 161; *Gibson & Co. v. Gibson*, [1913] 3 K. B. 379.

(*e*) See *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302, and pp. 56, 58, *ante*.

- (2) from the presence of the defendant in such country at the time when the obligation in respect of which the action is brought was incurred in that country.

Comment and Illustrations.

Clause 1. "Whilst we think," it is laid down by the Court of Queen's Bench, "that there may be other grounds for holding a person bound by the judgment of the tribunal of a foreign country than those enumerated in *Douglas v. Forrest* (f), we doubt very much whether the possession of property, locally situated in that country and protected by its laws, does afford such a ground. It should rather seem that, whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment. But it is unnecessary to decide this, as the defendants had in this case no property in France" (g).

This statement, though not quite decisive, appears to negative the claim made by the Courts of some foreign countries, and especially of Scotland (h), to ground jurisdiction in an action *in personam* on the mere fact of the possession by the defendant of property lying within the limits of the country to which the Courts belong (i).

1. X is domiciled and resident in England. He possesses goods in a house in Edinburgh. A brings an action against X in the Court of Session for breach of contract in England. X's goods in Edinburgh are arrested to found jurisdiction (*ad fundandam jurisdictionem*). The Court has no jurisdiction (k).

(f) 4 Bing. 703; and Rule 95, p. 393, *ante*.

(g) *Schibbsby v. Westenholz* (1870), L. R. 6 Q. B. 155, 163, *per curiam*. See also *Voinet v. Barrett* (1885), 55 L. J. Q. B. 39; *Emanuel v. Symon*, [1908] 1 K. B. (C. A.) 302. Contrast *Cowan v. Braidwood* (1840), 1 M. & Gr. 882.

(h) See *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 99; *Douglas v. Jones* (1831), 9 Sh. & D. 856; Rule 116, p. 458, *post*.

(i) See, however, p. 405, *ante*, as to the possibility of a contract with reference to land in a foreign country implying submission to the jurisdiction of the Courts of such country.

(k) *I.e.*, the Scottish Court is not a "Court of competent jurisdiction" in the opinion of English judges. *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 99. See, as to the ambiguity of the expression "Court of competent jurisdiction," pp. 386—388, *ante*, and compare Rule 116, p. 458, *post*, and the Judg-

2. *A* is a fruit merchant at Edinburgh. He brings an action in the Court of Session against the L. & N. W. Ry. Co. for damage to fruit of *A*'s, arising from the negligence of the defendants in the carriage thereof. The act of negligence takes place in England; *A* arrests movable property of the defendant's in Scotland. The Court has no jurisdiction (*l*).

3. *A*, an Englishman resident in London, has a claim against *X & Co.*, an English company resident in London, in respect of a life policy granted to *N*. *X & Co.* have money in a bank in Scotland. *A* arrests the money due by the bank to *X & Co.*, and brings an action in the Court of Session against *X & Co.* on the policy. The Court has no jurisdiction (*m*).

Clause 2. A dictum of Blackburn, J., has suggested that under the circumstances stated in clause 2, the judgment of a foreign Court would bind the defendant, *i.e.*, the Court would be a Court of competent jurisdiction.

The Privy Council, however, have distinctly held that these circumstances are not sufficient to give jurisdiction, and have thus stated and commented upon Blackburn's doctrine:—

"The words of Blackburn, J.'s, judgment, in *Schibsby v. Westenholz* (*n*), . . . are these:—

"'If, at the time when the obligation was contracted, the
 "'defendants were within the foreign country, but left it before
 "'the suit was instituted, we should be inclined to think the laws
 "'of that country bound them; though, before finally deciding
 "'this, we should like to hear the question argued.'

ments Extension Act, 1868 (31 & 32 Vict. c. 54), s. 8. The fact that this ground of exercise of jurisdiction is not recognised generally is admitted in Scotland. See *Pick v. Stewart, Galbraith & Co., Ltd.* (1907), 15 Sc. L. T. 447.

(*l*) See *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 99. The Court has jurisdiction according to Scottish law.

(*m*) See, for the facts, *Parken v. Royal Exchange Co.* (8 D. 365), cited 3 Macq. 109. In this case it was held that the Court of Session had jurisdiction according to Scottish law. But the case does not decide that it was a "Court of competent jurisdiction" in the sense in which the words are here used, *i.e.*, according to English law. Some doubt once existed whether, even according to Scottish law, jurisdiction arising from arrestment goes beyond the right to deal with the property arrested. See *L. & N. W. Rail. Co. v. Lindsay* (1858), 3 Macq. 106, 107, opinion of Cranworth, L. C.; but this view is now superseded. See, on the extent of jurisdiction, *Leggat Brothers v. Gray*, [1908] S. C. 67; *Hope v. Derwent Rolling Mills Co., Ltd.* (1905), 7 F. 837; *Union Electric Co., Ltd. v. Holman & Co.*, [1913] S. C. 954; Maclaren, Court of Session Practice, pp. 43, 49.

(*n*) L. R. 6 Q. B. 161.

“Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court; and, if this was what Blackburn, J., meant, their Lordships could not regard any mere inclination of opinion, on a question of such large and general importance, on which the judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsy v. Westenholz* (o), Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the *forum loci contractûs*, as having, by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied” (p).

It may, therefore, be concluded, at any rate with great probability, that, as stated in clause 2, the mere presence of a defendant in a country at a time when an obligation is incurred does not of itself give the Courts jurisdiction over him in respect of such obligation.

1. X, a British subject domiciled in England, has held an official position and resided in Italy. X, whilst residing there, is guilty of a fraud, but, before proceedings are commenced against him in respect thereof, he has returned to and taken up his permanent residence in England. An action, of which he has notice in England, is brought against him in respect of the fraud in an

(o) L. R. 6 Q. B. 161.

(p) *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685, 686, judgment of P. C.

Italian Court, and judgment for 1,000*l.* is recovered. The Italian Court has no jurisdiction (*q*).

2. *X*, a Swiss subject, when in Paris, enters into a contract with *A* that he will not carry on a certain trade in England or elsewhere. When *X* is residing in England he carries on the trade there in breach of his contract. *A* brings an action against *X* in a French Court. The French Court has no jurisdiction (*r*).

(*q*) Suggested by *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A. C. 670.

(*r*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371.

CHAPTER XIV.

JURISDICTION IN ACTIONS IN REM (a).

RULE 97 (b).—In an action or proceeding *in rem* the Courts of a foreign country have jurisdiction to determine the title to any immovable or movable within such country.

Comment.

The foundation of jurisdiction in an “action *in rem*”—using these words in their very widest sense—is the power to deal with or dispose of the property, the title to which, or the possession whereof, is in question. If the sovereign of a country has in fact the power to transfer the ownership or possession of property, the judgment of his Courts in regard to such property is decisive in regard to the right to such property (c).

“If the matter in controversy is land,” writes Story, “or other immovable property, the judgment pronounced in the *forum rei sitæ* is held to be of universal obligation, as to all the matters of right and title which it professes to decide in relation thereto. This results from the very nature of the case; for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, in cases of immovables, the judgment of the *forum rei sitæ* is held absolutely conclusive” (d).

“The same principle,” writes Story, “is applied to all . . . cases of proceedings *in rem*, against movable property, within the jurisdiction of the Court pronouncing the judgment. What-

(a) As to the distinction between an action *in personam* and an action *in rem*, see *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, opinion of Blackburn, J.; *Meyer v. Ralli* (1876), 1 C. P. D. 358; *The City of Mecca* (1879), 5 P. D. 28; (1881) 6 P. D. (C. A.) 106; *In re Trufort* (1887), 36 Ch. D. 600; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. (C. A.) 460; *Carr v. Francis, Times & Co.*, [1902] A. C. 176.

(b) See Story, s. 592.

(c) See Intro., General Principle No. III., p. 40, *ante*.

(d) Story, s. 591.

“ever the Court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country, where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign Courts of Admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture [or of damage by collision], or of any of the like nature, over which such Courts have a rightful jurisdiction, founded on the actual or constructive possession of the subject-matter (*res*)” (*e*).

These words are an authoritative statement of the principle accepted by English judges that the Courts of a country are Courts of competent jurisdiction (*f*) with regard to the title to, or possession of, movable not less than immovable property which is situate in that country, or, it may be added, which is at the moment under the actual and lawful control of the sovereign whom such Courts represent.

Our Rule, it should be noted, is of wide application. It applies not only to proceedings which are in strictness actions *in rem*, but also to proceedings such as the administration of a deceased person's property (*g*) which, though not strictly actions *in rem*, determine the title to property.

Illustrations.

1. Goods belonging to *A*, an Englishman, are on board a Prussian ship which is wrecked in Norway. The goods are sold in Norway, as *A* alleges, wrongfully. *A* takes proceedings in a Norwegian Court to set aside the sale. The Norwegian Court has jurisdiction to determine the title to the goods (*h*).

2. The right to the possession of English bills, drawn and accepted in England by English firms, is raised before a Norwe-

(*e*) Story, s. 592, cited with approval in *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428, 429, opinion of Blackburn, J.. Compare *Minna Craig Steamship Co. v. Chartered, & Co. Bank*, [1897] 1 Q. B. (C. A.) 460.

(*f*) But as to movable property not of exclusively competent jurisdiction. Compare, as to the principle of effectiveness, Intro., p. 40, *ante*; and as to the law governing the assignment of a movable, Rule 152, *post*. And see *Cammell v. Sewell* (1860), 5 H. & N. 728, 744, 745, judgment of Crompton, J.; *In re Queensland Mercantile, & Co.*, [1891] 1 Ch. 536, 545; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

(*g*) See chap. xvi., Rule 101, p. 427, *post*.

(*h*) See *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350 (Ex. Ch.).

gian Court whilst the bills are in Norway, in the hands of *N*, the agent of *X*, to whom the bills have been indorsed in England. The Norwegian Court has jurisdiction to determine the right to the possession of the bills (*i*).

3. *N* dies domiciled in England leaving land and money in New York. The Courts of New York have jurisdiction to administer and to determine the right to succeed to *N*'s land and money in New York (*k*).

(*i*) *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

(*k*) Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1, 19, language of Lord Cranworth, and p. 23, language of Lord Chelmsford. See chap. xvi., Rule 101, p. 427, *post*.

CHAPTER XV.

JURISDICTION IN MATTERS OF DIVORCE AND AS
REGARDS VALIDITY OF MARRIAGE.

I. DIVORCE.

(A) WHERE COURTS HAVE JURISDICTION.

RULE 98.—The Courts of a foreign country have jurisdiction to dissolve the marriage of any parties domiciled in such foreign country at the commencement of the proceedings for divorce (*a*).

This Rule applies to—

- (1) an English marriage,
- (2) a foreign marriage.

Comment.

This divorce jurisdiction (*b*) of the Courts of a foreign country where the parties to a marriage are domiciled is not affected either by the country where the marriage is celebrated, or by the domicile or the nationality of the parties at the time of the marriage. Rule 98, moreover, applies as well to an "English marriage," *i.e.*, a marriage which, whether celebrated in England or elsewhere, is entered into by parties of whom the husband is at the time thereof domiciled in England, as to a "foreign marriage," by which term is meant any marriage (*c*) which does not fall

(*a*) *Bater v. Bater*, [1906] P. (C. A.) 209; *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Walker v. Walker*, [1919] A. C. 947; *Board v. Board*, *ibid.*, 956; *Vardopulo v. Vardopulo* (1909), 25 T. L. R. 410; (C. A.) 518; and see App., Note 12, "Theories of Divorce"; Note 16, "Effect of Foreign Divorce on English Marriage."

(*b*) *I.e.*, in the opinion of English judges, or according to the rules with reference to the conflict of laws maintained by English Courts.

(*c*) For the definition of marriage, see p. 289, *ante*. The rule here laid down is concerned only with such marriages. Contrast *Rex v. Superintendent Registrar of Marriages for Hammersmith*, *Ex parte Mir-Anwaruddin*, [1917] 1 K. B. (C. A.) 634; and see App., Note 15.

within the description or definition just given of an English marriage. A doubt, indeed, was at one time entertained whether the Court of any foreign country could, in the eyes of English tribunals, dissolve an English marriage. But this doubt has now been entirely removed, and the law on this point has been authoritatively laid down as follows:—

“The law now unquestionably stands in this position: That the Court of the existing *bonâ fide* domicile for the time being of the married pair has jurisdiction over persons originally domiciled in another country to undo a marriage solemnized in that other country. It seems to me that that is the law now, applicable to this case” [viz., the case of British subjects originally domiciled in England who inter-married in England, and had been divorced in New York], “because we have it as a fact that the domicile of the parties, through the husband, was an American domicile—a domicile in the State of New York” (d).

“When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. The opinions expressed by the English common law judges in *Lolley’s Case* (e) gave rise to a doubt whether that principle was in consistency with the law of England, which at that time did not allow a marriage to be judicially dissolved. That doubt has since been dispelled; and the law of England was, in their Lordships’ opinion, correctly stated by Lord Westbury in *Shaw v. Gould* (f), in these terms: ‘The position that the tribunal of a foreign country, having jurisdiction to dissolve the marriages of its own subjects, is competent to pronounce a similar decree between English subjects who were married in England, but who before, and at the time of, the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bonâ fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the

(d) *Bater v. Bater*, [1906] P. (C. A.) 209, 232, judgment of Collins, M. R.

(e) (1812), Russ. & Ry. 237; 2 Cl. & F. 567.

(f) (1868), L. R. 3 H. L. 85. See *Harvey v. Farnie* (1882), 8 App. Cas. 43; *Briggs v. Briggs* (1880), 5 P. D. 163, which established the new doctrine.

“resolution commonly cited as the resolution of the judges in “*Lolley's Case*” (g).

The Court, moreover, of the country where the parties are domiciled at the time of the proceedings for divorce has jurisdiction to grant a divorce on any ground for which a divorce may be granted under the law of such country, even though such ground, *e.g.*, incompatibility of temper, is not a cause for which divorce could be obtained in the country, *e.g.*, England, where the parties were domiciled at the time of the marriage (h). It may now, in short, be taken to be the established rule of English law, that domicile is the true test of divorce jurisdiction.

The parties at the time of the divorce under the law of the foreign country where they are then domiciled, *e.g.*, Sweden, may be still citizens or subjects of another country, and of a country, *e.g.*, Italy, under the law of which divorce does not exist. But even in this case the English Courts adhere, it is submitted, to the principle that domicile is the test of divorce jurisdiction, and hold that a Swedish Divorce Court has jurisdiction to dissolve the marriage of Italian citizens domiciled in Sweden. It must, however, be admitted that, where citizenship and domicile differ, cases of considerable nicety may arise, especially in dealing with the position of citizens of countries such as Italy, which make personal capacity depend, not upon domicile, but upon allegiance or nationality, and further do not recognize divorce as regards their own citizens (i). But any difficulty will, by English Courts, now be almost certainly solved by treating any divorce as valid which is granted by the Divorce Court of the country where the parties are domiciled (k), on the English theory of domicile.

(g) *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 527, 528, judgment of Privy Council, cited with approval in *Bater v. Bater*, [1906] P. (C. A.) 209, 235, judgment of Romer, L. J.

(h) *Bater v. Bater*, [1906] P. (C. A.) 209; *Humphrey v. Humphrey* (1895), 33 Se. L. R. 99; *Sooty v. Attorney-General* (1886), 11 P. D. 128. The rule in Scotland appears to be otherwise; *Stirling v. Stirling*, [1908] 2 Ch. 344, 348, 349; *C. D. v. A. B.*, [1908] S. C. 737, 739 n.

(i) See Fiore, ss. 117—134.

(k) A fraudulent pretence that the parties to divorce proceedings are domiciled in the foreign country, *e.g.*, New York, where the divorce is obtained, will in England invalidate the divorce. See Rule 105, *post*; *Bonaparte v. Bonaparte*, [1892] P. 402; *Constantinidi v. Constantinidi*, [1903] P. 246; and compare *Bater v. Bater*, [1906] P. 217—220, judgment of Sir J. Gorell Barnes, President. A divorce in the country of domicile may be treated as invalid if the decree is pronounced without notice of the proceedings to the respondent. *Colliss v. Hector* (1875), L. R. 19 Eq. 334, 340—342.

Illustrations.

1. *H* and *W* are British subjects domiciled in England. They there intermarry. *H* afterwards becomes domiciled in New York. *W* takes proceedings to obtain divorce in a New York Court. The Court has jurisdiction (*l*).

2. The circumstances are the same as in Illustration 1, except that *W* takes proceedings for divorce on a ground which is a cause for divorce under the law of New York, but is not a ground on which divorce could be obtained in England (*m*). The Court has jurisdiction.

3. *H* and *W* are Italian subjects domiciled in Sweden. Under Italian law they could, under no circumstances, obtain a divorce in Italy. *H* takes proceedings to obtain divorce in a Swedish Court, and divorce is granted on a ground, *e.g.*, incompatibility of temper, for which a divorce could not be granted in England. The Court has (*semble*) jurisdiction (*n*).

SUB-RULE.—The Courts of a foreign country which have jurisdiction to dissolve the marriage of the parties thereto have jurisdiction to entertain an action against a co-respondent in a divorce suit for damages due from such co-respondent to the husband in favour of whom such divorce is granted, and this without reference to the residence or the domicile of such co-respondent at the commencement of the suit (*o*).

Comment and Illustration.

H, resident and domiciled in British India, petitions for divorce from his wife, *W*. The Indian Court has jurisdiction to grant a divorce under the Indian Divorce Act, No. 4 of 1869, s. 2.

(*l*) *Bater v. Bater*, [1906] P. (C. A.) 209.

(*m*) *Bater v. Bater*, [1906] P. (C. A.) 209; and *Humphrey v. Humphrey* (1895), 33 Sc. L. R. 99; *Scott v. Attorney-General* (1886), 11 P. D. 128.

(*n*) *I.e.*, English Courts would hold that the Swedish Courts were Courts of competent jurisdiction, and that the divorce was valid, though apparently it would not be held valid in Italy.

(*o*) Compare *Rush v. Rush* (1920), 89 L. J. P. (C. A.) 129; [1920] P. (C. A.) 242; *Rayment v. Rayment*, [1910] P. 271.

X is a co-respondent. At the time when the petition is presented *X* is neither domiciled nor resident in India. *H* recovers judgment against *X* for 7,000*l.* The Indian Court has jurisdiction to entertain an action against *X*, and *H* may recover the 7,000*l.* in an action against *X* in the English High Court (*p*).

(B) WHERE COURTS HAVE NO JURISDICTION.

RULE 99.—Subject to the possible exception hereinafter mentioned, the Courts of a foreign country have no jurisdiction to dissolve the marriage of parties not domiciled in such foreign country at the commencement of the proceedings for divorce (*q*).

Comment and Illustrations.

This Rule certainly holds good as to English marriages (*r*).

"In no case has a foreign divorce been held to invalidate an English marriage between English subjects, where the parties were not domiciled in the country by whose tribunals the divorce was granted" (*s*). The Scottish Courts at one time claimed the right to dissolve English marriages where the parties had acquired no real domicile in Scotland, but had merely resided there a sufficient time to give the Scottish Courts jurisdiction, according to one view of Scottish law (*t*), and this claim was consistently re-

(*p*) *Phillips v. Batho*, [1913] 3 K. B. 25, which, however, applies in terms only to the case of a "foreign country" which is part of the British dominions, and leaves open the case of a judgment in any other foreign country.

(*q*) *Pitt v. Pitt* (1864), 4 Macq. 627; *Dolphin v. Robins* (1859), 7 H. L. C. 390; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Shaw v. Attorney-General* (1870), L. R. 2 P. & D. 156; *Sinclair v. Sinclair* (1798), 1 Hagg. Cons. 294; *Tollemache v. Tollemache* (1859), 1 Sw. & Tr. 557; *Green v. Green*, [1893] P. 89. Conf. *In re Mackenzie*, [1911] 1 Ch. 578; *Ramos v. Ramos* (1911), 27 T. L. R. 515; *Keyes v. Keyes* (1921), 37 T. L. R. 499; [1921] P. 204.

(*r*) *Green v. Green*, [1893] P. 89.

(*s*) *Shaw v. Attorney-General* (1870), L. R. 2 P. & D. 156, 161, 162, per Lord Penzance.

(*t*) See, however, *Pitt v. Pitt* (1864), 4 Macq. 627, which made it doubtful whether, even according to the law of Scotland, the Scottish Courts had, under such circumstances, the right to pronounce a divorce; *Barkworth v. Barkworth*, [1913] S. C. 759, which shows that the old clause is not now adhered to. In *Stavert v. Stavert* (1882), 9 R. 519, it was distinctly laid down that an English marriage could not be dissolved on the basis of mere residence. *Low v. Low* (1891), 19 R. 115.

pudiated by English tribunals. In spite, therefore, of doubts formerly expressed on the subject (*u*), it must be taken now as clearly established that the Scottish Courts have no power to dissolve an English marriage where the parties are not really domiciled in Scotland (*x*); and, further, that the same doctrine applies to all foreign Courts (*y*).

H and *W*, a man and woman domiciled in England, are married at Greenwich. *H*, the husband, afterwards resides, but does not obtain a domicile, in Scotland. He then applies for and obtains a divorce from the Court of Session. The Court of Session has no jurisdiction to dissolve the marriage (*z*).

H and *W*, a man and woman domiciled in England, are married at Greenwich. *H* afterwards resides, but does not obtain a domicile, in British India. While residing in India he petitions, under the Indian Divorce Act, No. IV. of 1869, s. 2, for and obtains a divorce from the Indian Divorce Court. The Court has no jurisdiction (*a*).

Nor is there any reason to doubt that English tribunals apply the same rule to a foreign divorce purporting to dissolve a foreign marriage as to a foreign divorce purporting to dissolve an English marriage, and that, therefore, a foreign divorce is invalid in England, in the case of a foreign marriage, if the parties to the marriage are, at the time of the divorce, not domiciled in the country where the Court granting the divorce exercises jurisdiction.

H and *W*, domiciled French subjects, are married in France. While still retaining their French domicile they are divorced in

(*u*) See expressions of Lord Chelmsford in *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 57.

(*x*) *Dolphin v. Robins* (1859), 7 H. L. C. 390, 414, judgment of Lord Cranworth.

(*y*) *Lolley's Case* (1812), 2 Cl. & F. 567; *McCarthy v. De Caix* (1831), *Ibid.* 568.

(*z*) *I.e.*, is not, in the opinion of English judges, a Court of competent jurisdiction, and the divorce is consequently invalid in England. See *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11; *Tollemache v. Tollemache* (1859), 1 Sw. & Tr. 557.

(*a*) The Indian Divorce Court is not, in the opinion of English judges, a Court of competent jurisdiction. See *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Keyes v. Keyes & Gray* (1921), 37 T. L. R. 499; [1921] P. 204; Indian Divorces (Validity) Act, 1921 (11 & 12 Geo. 5, c. 18); and compare Rattigan, *Law of Divorce (India)*, pp. 6—13, and App., Note 17, "Divorces under the Indian Divorce Act, &c."

Belgium, where they are residing. The Belgian Courts have probably no jurisdiction (*b*).

Exception.—The Courts of a foreign country, where the parties to a marriage are not domiciled, have jurisdiction to dissolve their marriage, if the divorce granted by such Courts would be held valid by the Courts of the country where at the time of the proceedings for divorce the parties are domiciled.

Comment,

In a case, the circumstances of which brought it within this Exception, the existence of the Exception, and the principle on which it rests, were thus judicially laid down:—

“The only question that remains for consideration is this question of English law: Are we to recognise in this country the binding effect of a decree obtained in a State in which the husband is not domiciled if the Courts of the State in which he is domiciled recognise the validity of that decree? This point has not been distinctly determined in the Courts of this country. . . .

“The evidence, in the present case, shows that in the State of New York [where the parties were domiciled] the decision of [*i.e.*, the divorce granted by] the Court of South Dakota [where the parties were not domiciled at the time of the divorce] would be recognised as valid. The point then is: Are we in this country to recognise the validity of a divorce which is recognised as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected

(*b*) See *Le Mesurier v. Le Mesurier*, [1895] A. C. 517, 540, cited p. 292, *ante*; and *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435, 442, cited p. 286, *ante*. The statements of law in these cases are so wide that they clearly apply not only to English but to foreign marriages. Nice questions may, however, be raised as to the effect in England of a foreign divorce granted in a country where the parties are not domiciled. It may, for example, be suggested with some reason that the Exception to Rule 63, p. 294, *ante*, may be applicable to the divorce jurisdiction of a foreign Court no less than to the divorce jurisdiction of the High Court. Note, further, the effect of the Exception to Rule 99.

A conflict is inevitable where divorce jurisdiction is exercised by foreign Courts on the score of nationality in respect of foreigners domiciled in England. Such divorces would clearly be held invalid in England.

“and determined by the decree that is recognised in the State of New York—the State of the domicil—as having affected and determined it. That being so, [*H*] and [*W*] his former wife, the present petitioner, have ceased to be husband and wife in the place where they were domiciled at the date of the decree. It seems to me logically to follow that this Court must recognise that state of dissolved union—dissolved, that is, in one State and recognised as dissolved in the other State—and that it must be recognised as dissolved all over the world” (*c*).

Illustrations.

1. *H*, a domiciled citizen of the State of New York, marries in England *W*, a domiciled Englishwoman. *W*, when settled apart from *H*, though not domiciled in the State of South Dakota, obtains a divorce from *H*, who is then domiciled in New York. A Court of New York admits the jurisdiction of the Court of South Dakota and treats the divorce as valid. The divorce is valid in England, *i.e.*, the South Dakota Court, though the parties were not domiciled in South Dakota, is treated as having jurisdiction (*d*).

2. *H* and *W*, Swedish subjects married in Sweden, are domiciled at Turin. While they are domiciled in Italy they obtain a divorce in Sweden. Italian Courts would apparently hold the divorce valid (*e*). The divorce (*semble*) is valid in England (*f*).

3. *H* and *W*, French citizens, domiciled in New York, obtain a divorce in France. If the divorce is in these circumstances valid in New York, it is (*semble*) valid in England; if, on the other hand, it is invalid in New York, it is also (*semble*) invalid in England (*g*).

(*c*) *Armitage v. Attorney-General*, [1906] P. 135, 141, 142, judgment of Sir J. Gorell Barnes, Pres.

(*d*) *Ibid.*, 135.

(*e*) The doctrine maintained by Italian lawyers appears to be that divorce jurisdiction depends not upon the domicil, but upon the nationality of the parties. See Fiore, ss. 131, 132.

(*f*) *Armitage v. Attorney-General*, [1906] P. 135.

(*g*) The difference is that if the divorce is valid in New York, where the parties are domiciled, the case falls within the exception to Rule 99; if it is invalid in New York the case falls within Rule 99. Conf. *In re Stirling*, [1908] 2 Ch. 344; *Cass v. Cass* (1910), 26 T. L. R. 305; 102 L. T. 397.

II. DECLARATION OF NULLITY OF MARRIAGE.

RULE 100 (*h*).—The Courts of a foreign country have (*semble*) jurisdiction to declare the nullity of any marriage celebrated in such country.

Comment.

This Rule has no reference to divorce. It means that the Courts of a foreign country where a marriage has been celebrated have, according to English law, a right to determine whether the acts gone through by the parties to the marriage constituted a valid marriage according to the laws of that country. This jurisdiction is independent of the domicile of the parties. Our Rule cannot be laid down as absolutely certain. There appears to be no reported case which precisely decides how far our Courts admit the jurisdiction of the Courts of a foreign country to determine the validity of a marriage there celebrated. But English Courts have assumed jurisdiction for themselves to determine the validity of a marriage celebrated in England, even in the case of parties not domiciled in England (*i*), and there is no apparent reason why they should not concede an analogous jurisdiction to the Courts of a foreign country.

Two points are clear. First, the Courts of a country where a marriage is celebrated have no exclusive jurisdiction to determine its validity, for our Courts will determine the validity of a marriage celebrated abroad (*k*). Secondly, English Courts do not

(*h*) See Story, ss. 595—597; *Roach v. Garvan* (1748), 1 Ves. Sen. 157; *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 408; *Sinclair v. Sinclair* (1798), 1 Hagg. Cons. 294; *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46.

(*i*) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97.

(*k*) *Ruding v. Smith* (1821), 2 Hagg. Cons. 371. See *Kent v. Burgess* (1840), 11 Sim. 361; but compare *Roach v. Garvan* (1748), 1 Ves. Sen. 157. Jurisdiction to make a declaration of nullity may (*semble*) be given by the domicile of the respondent (*Johnson v. Cooke*, [1898] 2 Ir. R. 130), though the marriage was celebrated in another country. The respondent, however, was also resident in Ireland, and did not contest the action. But see *Bater v. Bater*, [1906] P. 209, 220, and Rule 65, p. 300, *ante*. In *Turner v. Thompson* (1888), 13 P. D. 37, Hannen, Pres., recognised the validity of a decree of dissolution of marriage by the Court of the domicile of parties, the decree being equivalent to a decree of nullity. In *Moore v. Bull*, [1891] P. 279, 281, the validity of a decree of nullity based on domicile or residence was assumed, but not decided.

attach much importance to any decision as to the validity of a marriage given by the Court of a foreign country, *e.g.*, Belgium, which is not the country, *e.g.*, France, where the marriage was celebrated, and it would seem that the Courts of a foreign country are not, in general at least, held by English judges to be Courts of competent jurisdiction for determining the validity of a marriage which does not take place in such foreign country.

"The validity of marriage," says Lord Stowell, "however, must depend in a great degree on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized would carry with it great authority in this country; but I am not prepared to say that a judgment of a third country on the validity of a marriage, not within its territories nor had between subjects of that country, would be universally binding. For instance, the marriage alleged by the husband is a French marriage [*i.e.*, a marriage celebrated in France]. A French judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at Brussels on a marriage in France would have the same authority, much less on a marriage celebrated here in England" (1).

(1) Judgment of Lord Stowell, *Sinclair v. Sinclair* (1798), 1 Hagg. Cons. 297. Whether the mere residence of one or both of the parties in a foreign country gives the Courts of such country (in the opinion of our Courts) jurisdiction to adjudicate upon the *validity* of a marriage celebrated in another country, *e.g.*, England, is doubtful. Compare Rule 65, p. 300, *ante*, as to the jurisdiction of the High Court.

It has been judicially suggested that something may depend on the cause for which a decree or judgment of nullity is granted by a foreign Court. "It may possibly be that if a suit were brought for nullity on the ground of impotence, and the facts were established in favour of the petitioner, either in the Court of the domicile of the parties or in the Court of the country in which the marriage was celebrated, it might be reasonable to hold that such a decree ought to be treated as universally binding, but it does not at all follow, where the only matter in dispute is whether a marriage ought to be held valid in the country where it was celebrated, and its validity is challenged on the ground of want of compliance with the formalities required by the laws of another country, that the Courts of the former country are to be bound by a decision on the question of the validity of the marriage given in the other country, even though it be the country of the domicile of one of the parties. It certainly would be somewhat startling if this Court, having come to the conclusion that the marriage in question between the appellant and Philip was valid in England, should yet hold that the French decision that it was not a valid marriage was binding upon it." *Ogden v. Ogden*, [1908] P. (C. A.) 46, 80, 81, judgment of C. A.

Illustrations.

1. *H*, an Englishman, and *W*, an Englishwoman, domiciled in England, go through what purports to be the celebration of a marriage in France. *H* takes proceedings in a French Court to have the marriage declared invalid on account of the neglect of some of the forms required by French law. *Seemle*, the French Court has jurisdiction to determine the validity of the marriage (*m*).

2. *H* and *W*, an Englishman and an Englishwoman, domiciled in England, go through what purports to be the celebration of a marriage in France. Afterwards, when *H* and *W* are domiciled in Belgium, *H* obtains a sentence of nullity of marriage in a Belgian Court. Whether the Court has jurisdiction? (*n*).

(*m*) See *Roach v. Garvan* (1748), 1 Ves. Sen. 157; *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 408.

(*n*) *Sinclair v. Sinclair* (1798), 1 Hagg. Cons. 294; *Turner v. Thompson* (1888), 13 P. D. 37.

CHAPTER XVI.

JURISDICTION IN MATTERS OF ADMINISTRATION
AND SUCCESSION.

RULE 101 (*a*).—The Courts of a foreign country have jurisdiction to administer, and to determine the succession to, all immovables and movables of a deceased person locally situate in such country.

This jurisdiction is unaffected by the domicil of the deceased.

Comment and Illustration.

This Rule is merely an application or result of Rule 97. There is no reason, it may be added, to suppose that English Courts deny to foreign tribunals in matters of administration as extensive a jurisdiction as they claim for themselves.

N, an Englishman domiciled in England, dies in England intestate, leaving 10,000*l.* in New York. Administration is taken out in New York. The New York Courts have jurisdiction to administer the 10,000*l.*, and if they see fit, to determine who are the persons entitled to succeed beneficially to the distributable residue of the 10,000*l.* (*b*).

RULE 102 (*c*).—The Courts of a foreign country have jurisdiction to determine the succession to all movables

(*a*) See Story, ss. 591, 592, cited pp. 413, 414, *ante*, and Rule 97, p. 413, *ante*; and *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A. C. 503. Compare Rule 152, p. 561, *post*. Conf. *Craster v. Thomas*, [1909] 2 Ch. 348, which taken together with *Hewson v. Shelley*, [1914] 2 Ch. (C. A.) 13, shows that, even where a grant of administration is made to an administrator who obtains it by fraud, or under an erroneous belief that the intestate is dead, and sells part of deceased's immovables, the sale gives an unimpeachable title to a *bonâ fide* purchaser who does not know the circumstances which make the grant invalid. See pp. 442, 443, *post*.

(*b*) Compare *Enohin v. Wylie* (1862), 10 H. L. C. 1.

(*c*) Compare *In re Truport, Trafford v. Blanc* (1887), 36 Ch. D. 600; *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301. Compare *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34; and *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453.

wherever locally situate of a testator or intestate dying domiciled in such country.

Comment.

If a deceased person is at the moment of his death domiciled abroad, the Courts of his domicile have jurisdiction, though not necessarily exclusive jurisdiction, to decide upon the right to the succession to his property.

"The rule to be extracted from [the] cases appears to be this, "that although the parties claiming to be entitled to the estate of "a deceased person may not be bound to resort to the tribunals "of the country in which the deceased was domiciled, and although "the Courts of this country may be called upon to administer the "estate of a deceased person domiciled abroad, and in such case "may be bound to ascertain as best they can who, according to the "law of the domicile, are entitled to that estate, yet where the title "has been adjudicated upon by the Courts of the domicile, such "adjudication is binding upon, and must be followed by, the "Courts of this country" (d).

Illustrations.

1. *T* dies domiciled in France; he leaves money, goods, &c. both in France and in England. The French Courts have jurisdiction to determine whether *A* is or is not entitled to succeed to *T*'s money, &c. in France and in England (d).

2. *T*, an Englishman and a British subject, dies domiciled in Portugal. He leaves at his death goods in England. *A* claims to be, under Portuguese law, entitled to succeed to *T*'s movable property, and *inter alia* to the English goods. *A* would not be, according to English law, a legitimate son of *T*. The Portuguese Courts have jurisdiction to determine whether *A* is entitled to succeed to *T*'s movables (e).

(d) *In re Trufort* (1887), 36 Ch. D. 600, 611, per Stirling, J.

(e) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

CHAPTER XVII.

EFFECT OF FOREIGN JUDGMENTS IN ENGLAND (a).

I. GENERAL.

(i) *No Direct Operation.*

RULE 103.—A foreign judgment has no direct operation in England.

This Rule must be read subject to the effect of Rules 116(b) and 117(c).

Comment.

A foreign judgment (d) does not operate directly in England. The judgment of, *e.g.*, a French Court, cannot be enforced here by execution.

(ii) *Invalid Foreign Judgments.*

RULE 104.—Any foreign judgment which is not pronounced by a Court of competent jurisdiction (f) is invalid (g).

(a) As to foreign judgments, see Westlake, chap. xvii.; Story, ss. 584—618 l; Wharton, ss. 646—675; Savigny, Guthrie's transl. (2nd ed.), pp. 240—242; Foote, chap. xi.; and generally, see Piggott, *Foreign Judgments* (3rd ed.), pt. i.—iii.

(b) *I.e.*, Rule as to extension of certain judgments of Superior Court in one part of United Kingdom to any other part; and see the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54).

See also Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31); and Piggott, pt. iii., pp. 156, 157. The effect of this Act is purposely not embodied in this Digest.

(c) *I.e.*, Rule as to extension of certain judgments of Superior Courts in British possessions to England; and see the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), Part II.

(d) For definition of "foreign judgment," see p. 386, *ante*.

(e) See *Merrifield, Ziegler & Co. v. Liverpool Cotton Assn.* (1911), 105 L. T. 97, for example of a foreign judgment or award not enforceable by an English Court.

(f) For meaning of "Court of competent jurisdiction," see Rule 91, p. 386, *ante*.

(g) *I.e.*, of course, invalid in England. See *Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670, 684, *per Curiam*.

Whether a Court which has pronounced a foreign judgment is, or is not, a Court of competent jurisdiction in respect of the matter adjudicated upon by the Court is to be determined in accordance with Rules 91 to 102.

The validity of a foreign judgment is not, in general, affected by the fact that the Court which pronounces the judgment is not a proper Court (*h*).

Comment.

A judgment pronounced by a Court which is not a "Court of competent jurisdiction" in the sense in which the term is used in this Digest is a decision given by a Court with reference to a matter which, according to the principles maintained by our judges, the foreign Court had no right to determine. Hence the judgment is necessarily invalid in England, or, to look at the same thing from another point of view, the right acquired under the foreign judgment is not "duly" acquired, and is therefore not a right which is entitled to recognition in England (*i*).

Question.—Is a judgment pronounced by a foreign tribunal which is a Court of competent jurisdiction, but is not a "proper Court" (*k*), valid?

This question must almost certainly be answered in the affirmative, though the matter is one which requires some explanation (*l*).

The general current of authority strongly, if not decisively, favours the validity of such a judgment.

Thus it has been held that it is no answer to an action in England on a French judgment against a French citizen domiciled in France, that the Court giving the judgment was not a Court of competent jurisdiction according to French law, *i.e.*, was not a proper Court (*m*), and with reference to this case Westlake writes:

(*h*) *Vanquelin v. Bouard* (1863), 33 L. J. C. P. 78; *Pemberton v. Hughes*, [1899] 1 Ch. (C. A.) 781; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

But contrast *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429. For meaning of "proper Court," see Rule 91, p. 386, *ante*.

(*i*) See Intro., General Principle No. I., p. 23, *ante*.

(*k*) See Rule 91, p. 386, *ante*.

(*l*) Contrast *Vanquelin v. Bouard* (1863), 15 O. B. (N. S.) 341; 33 L. J. C. P. 78; and Westlake (5th ed.), p. 408, in favour of the validity of such judgment, with the opinion of Blackburn, J., in *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, cited p. 431, *post*. See also *Godard v. Gray* (1870), L. R. 6 Q. B. 139, 149.

(*m*) *Vanquelin v. Bouard* (1863), 15 O. B. (N. S.) 341.

"If the foreign suit was not brought in the right Court of a country which, as a territory, was internationally competent, this was matter of defence which ought to have been pleaded in that Court. . . . And the party cannot take the objection in "England" (n).

On the other hand, judicial language has certainly been used which seems to imply that the validity of a foreign judgment may depend on the Court pronouncing it being a proper Court. Thus with reference to the validity of a judgment *in rem* it has been laid down: "We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the Court sits [*i.e.*, whether the Court was a Court of competent jurisdiction]; and, secondly, whether the sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction [*i.e.*, whether the Court is a proper Court]. If these conditions are fulfilled, the adjudication is conclusive against all the world" (o). Whence it might be inferred that, at any rate in the opinion of Lord Blackburn, it was a condition of the validity of a foreign judgment that it should be pronounced by a proper Court, or, in other words, that the Court giving the judgment should possess not only extra-territorial competence, but also intra-territorial competence; and no doubt at first sight it appears a paradox that a judgment pronounced by a foreign, *e.g.*, by a French, Court, which has not authority to give judgment under French law, should ever be held valid in England.

The difficulties of the question raised and the apparent difference of opinion between high authorities may be removed by the following considerations:—

When a foreign, *e.g.*, a French, Court, which from an international point of view is a Court of competent jurisdiction, delivers a judgment in excess of the authority conferred upon the Court by French law, the judgment, though obviously not pronounced by a proper Court, may bear one of two different characters. It may be *irregular*, but have validity in France until it is set aside; or it may be a complete *nullity*, and have no legal effect whatever in France.

(n) Westlake (5th ed.), p. 400. Compare 3rd ed., p. 439, s. 319.

(o) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, opinion of Blackburn, J.

If, on the one hand, the judgment is simply irregular, and, until it is set aside, gives *A* a right in France, *e.g.*, to the payment of a sum of money by *X*, then it ought to be held valid in England, for *A* has acquired a right under French law, and English Courts are not Courts of Appeal from the judgment of a foreign tribunal.

If, on the other hand, the judgment is in France a mere nullity, and *A*, in whose favour it is given, acquires under it no rights in France, then it should be treated as invalid in England, for *A* has acquired no right under French or any other law which he is entitled to enforce in England (*p*).

To this it may be added that a judgment in fact pronounced by a foreign Court of competent jurisdiction is far more likely to be irregular than void. The practical result, therefore, follows that a judgment pronounced by a foreign Court of competent jurisdiction is generally valid in England, even though not pronounced by a proper Court.

Illustrations.

1. *A* obtains judgment in a French Court against *X*, a British subject, for 100*l*. The debt has been contracted, if at all, in England. *X* has never been in France, and there is no circumstance in the case giving the French Court, in the opinion of English judges, a right to pronounce judgment against *X* (*i.e.*, the French tribunal is not a Court of competent jurisdiction) (*q*): The judgment is invalid (*r*).

2. *X* is the owner of a British ship. An action *in rem* is brought by *A* against the ship in a Louisiana Admiralty Court. The ship is not, and never has been, in fact, under the control of the Court, nor within the territorial limits of the State of Louisiana. The Court gives judgment in favour of *A*. The judgment is invalid (*s*).

3. *X*, a British subject, is the owner of a British ship. At the suit of *A*, the ship is arrested when just outside the territorial waters of France, and an action *in rem* is brought against the ship

(*p*) See Intro., General Principle No. I., p. 23, *ante*.

(*q*) See as to jurisdiction of foreign Courts in actions *in personam*, Rules 95, 96, pp. 393, 408, *ante*.

(*r*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

(*s*) See as to jurisdiction of foreign Courts in actions *in rem*, Rule 97, p. 413, *ante*.

in a French Admiralty Court. Judgment is given against the ship. The judgment is invalid (*t*).

4. A colonial Court, at a time when *H* is domiciled in England, grants *H* a divorce from his wife, *W*. The Court not being a Court of competent jurisdiction (*u*), the sentence of divorce is invalid.

5. *A*, a French citizen resident in France, obtains judgment against *X*, a French citizen resident in France, for a debt due from *X* to *A*. The French Court has under French law jurisdiction only over traders. *X* is not a trader. The French Court is not a proper Court in which to sue *X*. No steps are taken by *X* to get the judgment of the French Court set aside. The judgment is (probably) valid (*x*).

6. *H* and *W*, husband and wife, are domiciled in Florida. *H* takes proceedings in the Florida Divorce Court to obtain a divorce from *W*. *W* does not appear. *H* obtains a divorce. There is an irregularity in the proceedings which might have given ground for an appeal, and which might on such appeal possibly have caused the divorce to be declared void. There is no appeal. The judgment of divorce is valid (*y*).

RULE 105 (*z*).—A foreign judgment is invalid which is obtained by fraud.

Such fraud may be either

(1) fraud on the part of the party in whose favour the judgment is given; or

(*t*) Compare *Borjesson v. Carlberg* (1878), 3 App. Cas. 1316; *Simpson v. Fogo* (1860), 1 J. & H. 18; (1863), 1 H. & M. 195; but see Exception to Rule 109, p. 442, *post*.

(*u*) See as to jurisdiction of foreign Courts in matters of divorce, Rules 98, 99, pp. 416, 420, *ante*.

(*x*) *I.e.*, in England. *Vanquelin v. Bouard* (1863), 15 C. B. (N. S.) 341; 33 L. J. C. P. 78.

(*y*) *Pemberton v. Hughes*, [1899] 1 Ch. (C. A.) 781, 792, judgment of Lindley, M. R.; pp. 794, 795, of Rigby, L. J.; and p. 796, judgment of Vaughan Williams, L. J.

(*z*) As to effect of fraud on validity of judgment generally, see *Duchess of Kingston's Case* (1776), 2 Sm. L. C. (9th ed.), 812; compare *Nouvion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 249, judgment of Cotton, L. J.; on judgments *in personam*, *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. (C. A.) 295; *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310; *Bowles v. Orr* (1835), 1 Y. & C. 464; *Blake v. Smith* (1810), 8 Sim. 303; *Manger v. Cash* (1889), 5 T. L. R. 271; on judgments *in rem*, Story, s. 592; *The Alfred Nobel*, [1918] P. 293; on judgments of divorce, *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 71, language of Lord Cranworth; p. 77, language of Lord Chelmsford.

- (2) fraud on the part of the Court pronouncing the judgment.

Comment.

Any judgment whatever (a), and therefore any foreign judgment, is, if obtained by fraud, invalid. The party contesting the validity of a judgment may prove fraud even though this cannot be done without re-trying the questions adjudicated upon by the foreign Court.

"There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits.

"Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff v. Oppenheimer* (b). At the time when that case was decided—namely, in 1882—there was a long line of authorities, including *Bank of Australasia v. Nias* (c), *Ochsenbein v. Papelier* (d), and *Cammell v. Sewell* (e), all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's Case* (f) the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to

(a) *Ochsenbein v. Papelier* (1873), L. R. 8 Ch. 695. Contrast *Robinson v. Fenner*, [1913] 3 K. B. 835, which shows the distinction between attacking a judgment obtained by practising a deception on the Court, and alleging that a judgment is invalid because the Court has declined to admit evidence showing that one of the parties to an agreement has defrauded the other.

(b) 10 Q. B. D. 295.

(c) 16 Q. B. 717.

(d) L. R. 8 Ch. 695.

(e) 5 H. & N. 728.

(f) 10 Q. B. D. 295.

“prove it without re-opening the merits, had never come forward
 “for explicit decision. That point was raised directly in the case
 “of *Abouloff v. Oppenheimer*, and it was decided. I cannot
 “fritter away that judgment, and I cannot read the judgments
 “without seeing that they amount to this: that if the fraud upon
 “the foreign Court consists in the fact that the plaintiff has
 “induced that Court by fraud to come to a wrong conclusion, you
 “can re-open the whole case even although you will have in this
 “Court to go into the very facts which were investigated, and
 “which were in issue in the foreign Court. The technical objec-
 “tion that the issue is the same is technically answered by the
 “technical reply that the issue is not the same, because in this
 “Court you have to consider whether the foreign Court has been
 “imposed upon. That, to my mind, is only meeting technical
 “argument by a technical answer, and I do not attach much
 “importance to it; but in that case the Court faced the difficulty
 “that you could not give effect to the defence without re-trying
 “the merits. The fraud practised on the Court, or alleged to
 “have been practised on the Court, was the misleading of the Court
 “by evidence known by the plaintiff to be false. That was the
 “whole fraud. The question of fact, whether what the plaintiff
 “had said in the Court below was or was not false, was the very
 “question of fact that had been adjudicated on in the foreign
 “Court; and, notwithstanding that was so, when the Court came
 “to consider how the two rules, to which I have alluded, could be
 “worked together they said: ‘Well, if that foreign judgment was
 “‘obtained fraudulently, and if it is necessary, in order to prove
 “‘that fraud, to re-try the merits, you are entitled to do so
 “‘according to the law of this country.’ I cannot read that case in
 “any other way” (g).

The fraud which vitiates a judgment must generally be fraud of the party in whose favour the judgment is obtained, but it may (conceivably, at any rate) be fraud on the part of the foreign Court giving the judgment, as where a Court gives judgment in favour of A, because the judges are bribed by some person, not the plaintiff, who wishes judgment to be given against X, the defendant.

The doctrine that fraud vitiates a judgment applies in principle to foreign judgments of every class, but the extent of its application differs somewhat according to the nature of the judgment.

(g) *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310, 316, 317, per Lindley, L. J.

It is clearly applicable to a judgment *in personam* (*h*), where, be it noted, the rights in question are the rights of the litigants or of their representatives.

It applies further, at any rate, between the litigants, to a judgment *in rem*. "The doctrine, however," writes Story [that in proceedings *in rem*, the judgment of a Court of competent jurisdiction is conclusive], "is always to be understood with this limitation, that the judgment has been obtained *bonâ fide* and "without fraud; for if fraud has intervened, it will doubtless "avoid the force and validity of the sentence" (*i*). But it is questionable whether the fraud which, as between the litigants, vitiates a judgment *in rem* affects the rights of third persons, *e.g.*, *bonâ fide* purchasers, who, in ignorance of the fraud, acquire under or in consequence of the judgment a title to the *res*, *e.g.*, a ship, affected thereby. "Fraud," it has been said by Mr. Justice Blackburn, in reference to this very question, "will indeed vitiate everything; though we may observe that there is much force in what "Mr. Mellish suggested in the course of his argument in this case, "that even if there had been fraud on the part of the litigants, or "even of the tribunal, it would be very questionable whether it "could be set up against a *bonâ fide* purchaser who was quite "ignorant of it" (*k*).

It applies again, though in a more limited way, to a judgment or sentence of divorce. If the fraud or collusion of the parties induces the Divorce Court of a foreign country to believe that it has jurisdiction where, according to the doctrine maintained by English tribunals, it has no jurisdiction, then the judgment or sentence of divorce is rendered in England invalid by such fraud or collusion (*l*). But if the fraud or collusion does not go to the root of the foreign Court's jurisdiction, but merely, by the pretence of facts which do not exist, or the suppression of facts which do exist, induces the foreign Court to grant a divorce which it would not otherwise have granted, then (*semble*), as long as such divorce continues in force in the country where it is granted, it cannot be invalidated in England merely on account of such fraud or collusion. In many of the judgments as to the effect of fraud

(*h*) *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310.

(*i*) Story, s. 592.

(*k*) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 433, opinion of Blackburn, J. See Exception, p. 442, *post*; and Rule 152, p. 561, *post*.

(*l*) *Dolphin v. Robins* (1859), 7 H. L. C. 390; 29 L. J. P. & M. 11; *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *Bonaparte v. Bonaparte*, [1892] P. 402.

on a judgment or sentence of divorce it has been said that the Courts will not recognise the decree of a foreign tribunal where the judgment has been obtained by the collusion or fraud of the parties. "But I think, when those cases are examined, that the collusion or fraud which was being referred to was in every case . . . collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court. In other words [they were], as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so had induced the Court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicile, and therefore collusion and fraud entered into many of those cases in a way that went to fortify the view that where there is no domicile there is no jurisdiction. But supposing that what was kept back was something that would have made the Court come to a different conclusion than it would otherwise have done, I can see no valid reason in the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside" (*m*).

If a divorce judgment "is a judgment *in rem*, or stands on the same footing, as I think it undoubtedly does, can it be impeached in proceedings taken in this country by a person not a party to the judgment at all? Can proceedings effectually be taken in this country while that judgment stands unimpeached in the country where it was made?" (*m*).

Illustrations.

1. *A* obtains in a Russian Court a judgment against *X* that *X* shall either deliver to *A* certain goods of *A*'s, then, as alleged, in *X*'s possession, or pay *A* a sum equivalent to 1,050*l*. The judgment, which is affirmed on appeal to a superior Russian Court, is obtained by *A*'s fraudulently concealing from the Court that at the very moment when the action is brought the goods are in the possession of *A*. The judgment is invalid (*o*).

2. *A* brings an action in Sicily against *X* to recover money alleged to be due on certain bills of exchange. *A* obtains judg-

(*m*) *Bater v. Bater*, [1906] P. 209, 218, judgment of Sir J. Gorell Barnes, Pres.

(*n*) *Ibid.*, 209, 228, per Collins, M. R.; conf. judgment of Romer, L. J., pp. 236, 237.

(*o*) *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. (C. A.) 295.

ment against *X* by fraudulently representing to the Italian Court that the bills of exchange were given under the authority of *X* and for mercantile transactions, whereas they were given without *X*'s authority for gambling debts. The judgment is invalid (*p*).

3. *A* obtains a judgment against *X* in a foreign Court. The judgment is given against *X* because *X* declines to bribe the foreign Court. The judgment is invalid (*q*).

4. *A* commences an action against *X* in France. It is agreed between *A* and *X* in France that the action shall be dropped and the whole matter in dispute be referred to arbitration in London. *X* under this arrangement returns to England. *A* fraudulently, and in breach of this arrangement, continues the action in France, and recovers judgment against *X* in a French Court for a sum equivalent to 220*l*. The judgment is invalid (*r*).

5. *X* is the owner of a British ship. *A*, when the ship is in France, brings an action *in rem* against the ship, and by means of fraud obtains from the French Court a judgment against the ship, under which it is assigned to *A* as owner. The judgment is invalid (*s*).

6. *H* and *W* marry and are domiciled in England. They wish to obtain a divorce, which they cannot do in England. *W* takes divorce proceedings against *H* in Scotland. They fraudulently and collusively pretend that they are domiciled in Scotland. A divorce is granted. The divorce is invalid (*t*).

7. In 1880 *W* marries *L*, her first husband. In 1886 *L* petitions for divorce from *W*, making *H*, afterwards *W*'s second husband, co-respondent. *W* presents cross petition charging *L* with cruelty. Both petitions are dismissed. *L* then goes from England to New York, and obtains a New York domicil. *W* and *H* also go to New York, and *W* there obtains a divorce from *L*, but the proceedings in England are not disclosed; if they had been disclosed, a divorce would not have been granted at New York. After the divorce *W* and *H* intermarry. Sixteen

(*p*) *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310.

(*q*) It is difficult to find any reported case of fraud on the part of a tribunal, but it is admitted that such fraud would invalidate the judgment of a Court.

(*r*) *Ochsenbein v. Papelier* (1873), L. R. 8 Ch. 695. See, especially, language of Selborne, C., p. 698.

(*s*) Compare *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 433, opinion of Blackburn, J.

(*t*) *Bonaparte v. Bonaparte*, [1892] P. 402. See *Shaw v. Gould* (1868), L. R. 3 H. L. 55.

years afterwards *H* petitions in the English Divorce Court for declaration of nullity of the marriage in New York on the ground that the New York divorce was obtained by fraud. Petition dismissed, *i.e.*, the divorce held valid (*u*).

RULE 106.—A foreign judgment is, possibly, invalid when the Court pronouncing the judgment refuses to give such recognition to the law of other nations as is required by the principles of private international law (?) (*x*).

Illustration.

D, domiciled in England, mortgages in England to *A* a ship lying at Liverpool. The ship is seized at New Orleans under a judgment against *D*. *A*, as being, under English law, the owner of the ship, opposes the sale of the ship before the Louisiana Court. The ship is sold under a writ of *fiери facias* for the benefit of *D*'s creditor, and the Louisiana Court refuses to recognize the right to the ship acquired by *A* in England. The refusal is based on the ground that the right was not acquired in such a manner as to be valid by the law of Louisiana. The ship is purchased by *X*. *A* and not *X* is, in England, the owner of the ship, *i.e.*, the Louisiana judgment is invalid, and *X* has not in England a good title to the ship against *A* (*y*).

(*u*) *Bater v. Bater*, [1906] P. (C. A.) 209.

(*x*) *Simpson v. Fogo* (1863), 32 L. J. Ch. 249; 1 H. & M. 195; (1860), 1 J. & H. 18; 29 L. J. Ch. 657. See, however, Westlake (5th ed.), s. 149; Foote, pp. 525, 539, 540.

(*y*) *Simpson v. Fogo* (1863), 1 H. & M. 195.

"Under these circumstances, having to come to a decision in a case which is
 "entirely new in specie, and which will never arise, as it seems to me, in any
 "other country in the world except Louisiana, I confess I yield to the view of
 "that section of the judges who considered, in the case of *Castrique v. Imrie*,
 "that even a judgment *in rem* may lose its binding force where there appears
 "on the face of it a perverse and deliberate refusal to recognise the law of
 "the country by which title has been validly conferred. The law of England,
 "being by the comity of nations that which must govern the transfer—the
 "transfer being in England, the parties resident here—the ship an English ship
 "at sea on a voyage from an English port; when I find a foreign Court saying
 "'We will deal with that ship as the property of the person who has already
 "'transferred it,' that seems to me to be so contrary to law, and to what is
 "required by the comity of nations, that I am bound to hold that the property
 "acquired by the Bank of Liverpool must prevail against a sale made on the
 "principle entertained by a foreign Court, that, as between mortgagors and
 "mortgagees, the mortgagees' interest is wholly to be extinguished, and the

RULE 107.—A foreign judgment may sometimes be invalid on account of the proceedings in which the judgment was obtained being opposed to natural justice (*e.g.*, owing to want of due notice to the party affected thereby). But in such a case the Court is (generally) not a Court of competent jurisdiction (*z*).

Comment.

With the justice of the decision arrived at by a foreign Court of competent jurisdiction our Courts have no concern. A foreign judgment may be perfectly valid, though unjust to the party against whom it is given. But the mode in which a Court proceeds may, it is said, be so opposed to natural justice as to invalidate the judgment of the Court.

This opposition, however, to natural justice in the procedure of a Court generally consists of want of due notice of action to an absent defendant affected by the judgment. This is, in reality, a

“right of the mortgagors is paramount and absolute.” *Simpson v. Fogo* (1863), 1 H. & M. 195, 247, judgment of Page-Wood, V.-C. These words show that the principle established by or relied upon in *Simpson v. Fogo* is (even if not of doubtful validity) at any rate of very narrow application. It would seem only to apply where the Court of a foreign country bases its judgment on the deliberate refusal to recognise a right duly acquired under the law of England. Its validity in this narrow sense is recognised in *In re Queensland Mercantile & Agency Co.*, [1892] 1 Ch. (C. A.) 219, 226. See also *Colliss v. Hector* (1875), L. R. 19 Eq. 334, 339. But in *Liverpool Marine Credit Co. v. Hunter* (1867), L. R. 4 Eq. 62; (1868), 3 Ch. 479, it was held that English creditors would not be restrained from attaching ships at New Orleans because justice would not be done there to English mortgagees, and that bonds given by such mortgagees to secure the release of such vessels could be sued on in England. See also *Robinson v. Fenner*, [1913] 3 K. B. 835.

(*z*) *Buchanan v. Rucker* (1808), 9 East, 192; *Henderson v. Henderson* (1844), 6 Q. B. 288; 13 L. J. Q. B. 274, 277; *Sheehy v. Professional Life Assurance Co.* (1857), 2 C. B. (N. S.) 211; 26 L. J. C. P. 302; *Crawley v. Isaacs* (1867), 16 L. T. 529; and compare, for good statement of law, Piggott, pp. 401—411. The judgment of a foreign Court is not opposed to natural justice either because such Court does not admit evidence which would now be admissible by an English Court (*Scarpetta v. Lowenfeld* (1911), 27 T. L. R. 509), or because the notice of action given to a defendant under the law of a foreign country is not as complete as such notice of proceedings would now be required by the law of England (*Jeannot v. Fuerst* (1909), 25 T. L. R. 424). See also *Robinson v. Fenner*, [1913] 3 K. B. 835.

It will be presumed, in the absence of evidence to the contrary, that a foreign Court will treat justly any defendant, and, therefore, money paid abroad under threat of legal proceedings cannot be recovered in England. See *Clydesdale Bank, Ltd. v. Schroeder & Co.*, [1913] 2 K. B. 1.

ground of objection to the jurisdiction of the foreign Court, and it is, to say the least, arguable that, whenever a foreign judgment is impeachable on the ground of opposition to natural justice, it is invalid, if at all, on the ground that the Court is not a Court of competent jurisdiction (*a*).

The objection, moreover, that a defendant did not receive due notice of action can be taken (it is submitted) only where the defendant at the commencement of the action is not resident in the country where it is brought. If he is, any notice, it is conceived, is sufficient which is in accordance with the law of the foreign country (*b*).

Illustrations.

1. A judgment is given in a Danish Court with regard to the validity of a will. The Court is constituted, in accordance with Danish law, of persons some of whom are interested in the property in dispute. The judgment in favour of such persons is opposed to natural justice, and is invalid (*c*).

2. A obtains a judgment in France against X, who is not a French citizen, and who is not in France, and has never been resident in France; and the only notice given to X is, in accordance with French law, a service of summons on a French official. X does not appear, and judgment is obtained against him. The judgment is invalid (*d*).

RULE 108.—A foreign judgment shown to be invalid under any of the foregoing Rules 104 to 107, is hereinafter termed an invalid foreign judgment.

RULE 109.—An invalid foreign judgment has (subject to the possible exception hereinafter mentioned) no effect (*e*).

(*a*) Compare *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

(*b*) Compare Foote, pp. 528—531.

(*c*) *Price v. Dewhurst* (1837), 8 Sim. 279.

(*d*) Compare *Schibsby v. Westenholz* (1870); L. R. 6 Q. B. 155. In *Schibsby v. Westenholz*, the defendant, residing in England, had notice of the action substantially equivalent to that which might have been given to absent defendants under O. L. P. Act, 1852, ss. 18, 19. The French procedure could not, therefore, be condemned by an English Court as contrary to natural justice. The real objection to it was that the French Court was not under the circumstances a Court of competent jurisdiction.

(*e*) *I.e.*, in England.

Comment.

When it is established that a foreign judgment to which effect is to be given in England is invalid, the judgment has no effect in England.

A Scottish or Irish judgment, however, which, in conformity with Rule 116, is extended to England by means of a certificate registered under the Judgments Extension Act, 1868, cannot be shown in England to be invalid. The judgment itself, therefore, must be treated as a valid judgment in England unless and until it is set aside by proper proceedings in Scotland or Ireland (*f*).

Illustrations.

1. *A* obtains judgment in a French Court against *X* for a debt amounting to 100*l*. The judgment is invalid. *A* cannot maintain an action against *X* on the judgment in England (*g*).

2. A Court in an American State divorces *H* from his wife, *W*. The divorce is invalid. *H*, during the lifetime of *W*, marries *N* in England. The marriage with *N* is invalid, and *H* is liable to be convicted of bigamy (*h*).

3. A foreign Admiralty Court gives a judgment *in rem* against an English ship. The judgment is invalid. If the ship comes to England the judgment cannot be enforced against the ship by an action *in rem* (*i*).

Exception.—An invalid foreign judgment *in rem* may possibly have an effect in England as an assignment, though not as a judgment (*k*).

Comment.

A foreign judgment given in an action *in rem*, *e.g.*, against a ship, may, as already pointed out, though invalid as a judgment, and indeed for any purpose as between the litigant parties, have

(*f*) Note that if an action be brought on a Scottish or Irish judgment in England, the judgment may, like any other foreign judgment, be shown to be invalid.

(*g*) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

(*h*) *Lolley's Case* (1812), 2 Cl. & F. 567; see *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *R. v. Russell* (1901), 70 L. J. K. B. 998; [1901] A. C. 446.

(*i*) See as to such an action, Rule 119, p. 467, *post*.

(*k*) See *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 433, opinion of Blackburn, J.; and compare Rule 152, p. 561, *post*; *Simpson v. Fogo* (1863), 1 H. & M. 195, 248. See also *Phillips v. Batho*, [1913] 3 K. B. 25, 30, per Scrutton, J.

an effect in England as a valid assignment of the ship to a third party; for if the ship, whilst still in the country where the judgment was given, is assigned under or by virtue of the judgment, *e.g.*, by the sale of the ship, under the order of the Court giving the judgment, to a *bonâ fide* purchaser, the assignment is valid by the *lex situs*, and therefore *primâ facie* valid everywhere; in other words, the judgment has an effect as an assignment.

The effect of this Exception may be best understood if it be borne in mind that it applies not only to an action strictly *in rem*, but to any judgment which affects the title to a thing, whether movable or immovable, and to any such judgment whether it be an English or a foreign judgment, unless indeed the judgment or decision of the Court, though given by a Court otherwise of competent jurisdiction, is by the law of the country where the thing in question is situate rendered *ab initio* invalid, in which case the judgment is obviously not in the circumstances a judgment of a Court of competent jurisdiction.

The bearing of this Exception is best understood from the following illustrations:—

Illustrations.

1. X purchases land in British India sold under a grant of administration to N by the proper Court. N, however, has obtained the grant of administration by means of a fraudulent misrepresentation, which deceived the Court and was absolutely unknown to X, the purchaser. The fraud is discovered and the administration to N revoked, and administration is thereupon granted to A. A cannot maintain an action against X unless the grant of administration is, under Anglo-Indian law, absolutely void *ab initio*, for, if so, the Court was in the circumstances not a Court of competent jurisdiction (1).

2. X purchases land in England from N, who has obtained a grant of administration from the High Court. N has obtained it through a natural and reasonable mistake, and therefore misrepresentation of facts, *e.g.*, through the assumption that A has died intestate. On the fact being ascertained that A is still alive, the grant of administration is revoked. A brings an action against X. The action cannot be maintained, since under the law of

(1) *Craster v. Thomas*, [1909] 2 Ch. 348, where it was held that the grant was not void *ab initio*, and that the purchaser had a good title. See *Debendra Nath Dutt v. Administrator-General of Bengal*, L. R. 35 Ind. Ap. 109, 117, per Lord Macnaghten.

England the grant of administration is not *ab initio* void. *A*'s remedy lies, therefore, only against *N* (*m*).

3. A foreign Admiralty Court gives a judgment *in rem* against a British ship owned by *A*, an Englishman. The judgment is obtained by the fraud of the plaintiff. The ship is under the judgment sold to *X*, a *bonâ fide* purchaser, who knows nothing of the fraud. When the ship comes to England, *A* lays claim to the ship, and shows that the foreign judgment was obtained by fraud. *Semble*, that *X* has a good title as against *A*, *i.e.*, that the judgment, though invalid, has an effect in England as an assignment (*n*).

(iii) *Valid Foreign Judgments.*

RULE 110.—A foreign judgment, which is not an invalid foreign judgment under Rules 104 to 107 is valid, and is hereinafter termed a valid foreign judgment.

RULE 111 (*o*).—Any foreign judgment is presumed to be a valid foreign judgment unless and until it is shown to be invalid.

RULE 112 (*p*).—A valid foreign judgment is conclusive as to any matter thereby adjudicated upon, and cannot be impeached for any error either

- (1) of fact (*q*), or
- (2) of law (*r*).

(*m*) Compare *Hewson v. Shelley*, [1914] 2 Ch. (C. A.) 13, overruling *Ellis v. Ellis*, [1905] 1 Ch. 613; *Grazebrook v. Fox* (1565), 1 Plowd. 275; *Abram v. Cunningham* (1677), 2 Lev. 182.

(*n*) See *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 433, opinion of Blackburn, J.; and compare Rule 152, p. 561, *post*; *Simpson v. Fogo* (1863), 1 H. & M. 195, 248. See also *Phillips v. Batho*, [1913] 3 K. B. 25, 30, per Scrutton, J.

(*o*) *Alivon v. Furnival* (1834), 1 C. M. & R. 277; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; *Henderson v. Henderson* (1844), 6 Q. B. 288; *Robertson v. Struth* (1844), 5 Q. B. 941.

"It need not be expressly alleged in the statement of claim that the Court had jurisdiction over the parties or the cause, such jurisdiction being presumed until the contrary is made to appear, but it is usual to do so." Bullen & Leake (7th ed.), p. 171, note (*i*).

(*p*) *Bank of Australasia v. Nias* (1851), 20 L. J. Q. B. 284; *Kelsall v. Marshall* (1856), 1 C. B. N. S. 241; 26 L. J. C. P. 19; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 238.

(*q*) *Henderson v. Henderson* (1844), 6 Q. B. 288; 13 L. J. Q. B. 274; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L. J. Ex. 238.

(*r*) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Godard v. Gray* (1870),

Comment.

"The decisions of the Court of Queen's Bench in *Bank of Australasia v. Nias* (*s*), of the Court of Common Pleas in *Bank of Australasia v. Harding* (*t*), and of the Court of Exchequer in *De Cosse Brissac v. Rathbone* (*u*) . . . leave it no longer open to contend, unless in a Court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defence to an action on it, that the tribunal mistook either the facts or the law" (*x*), and this holds whether the mistake be an error with regard either to foreign law or to English law, and whether such mistake do, or do not, appear on the face of the proceedings (*y*). The rights acquired under a foreign judgment stand, in short, in the same position as other rights duly acquired under foreign law (*z*), and are entitled to recognition to, at any rate, the same extent as other rights duly acquired under the law of any civilized country.

"The principle on which an action can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal, or that if such rights have not been in fact investigated and determined, it is because the parties, or one of them, have made default and not availed themselves of the opportunities afforded them by the foreign tribunal. In an action on a foreign judgment not impeached for fraud, the original cause of action is not re-investigated here, if the judgment was pronounced by a competent tribunal having jurisdiction over the litigating parties: *Godard*

L. R. 6 Q. B. 139; *Scott v. Pilkington* (1832), 2 B. & S. 11; 31 L. J. Q. B. 81; *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L. J. Ex. 238; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. (C. A.) 460.

(*s*) 16 Q. B. 717; 20 L. J. Q. B. 284.

(*t*) 9 C. B. 661; 19 L. J. C. P. 345.

(*u*) 6 H. & N. 301; 30 L. J. Ex. 238.

(*x*) *Godard v. Gray* (1870), L. R. 6 Q. B. 139, 150, judgment of Blackburn, J. It was indeed at one time maintained that a foreign judgment was merely evidence of the cause of action, *e.g.*, the debt in respect of which the judgment was given. See *Houlditch v. Donegal* (1834), 2 Cl. & F. 470, 477, language of Lord Brougham. But this doctrine may now be considered erroneous.

(*y*) *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *In re Trufort* (1887), 36 Ch. D. 600. Contrast *Novelli v. Rossi* (1831), 2 B. & Ad. 757; *Reimers v. Druce* (1857), 23 Beav. 150. *Semble*, that *Meyer v. Ralli* (1876), 1 C. P. D. 358, must either be treated as depending upon the very special circumstances of the case in which the parties admitted that the law of the foreign tribunal had not being correctly declared by its judgment, or else must be taken as wrongly decided.

(*z*) See Intro., General Principle No. I., p. 23, and pp. 25, 26, *ante*.

"v. *Gray* (a); *Schibbsby v. Westenholz* (b). The judgment is "treated as *res judicata*, and as giving rise to a new and independent obligation which it is just and expedient to recognise and "enforce" (c).

This general principle, though stated in reference to a judgment *in personam*, applies to every kind of judgment; it extends alike to a judgment *in personam* (d), to a judgment *in rem* (e), and to a judgment or sentence of divorce (f), or any other judgment having reference to status (g).

The difference between judgments *in personam* and judgments *in rem*, or as to status, lies not in their conclusiveness as to the matter which they decide, but in the nature of the matter which they must be taken to have decided, and as to which, therefore, alone they are conclusive. When a Court pronounces a judgment *in personam*, it decides only that *A* has a given right against *X*, e.g., a right to the payment of 20*l.* by *X*: the judgment, therefore, is conclusive only as between *A* and *X*, or their representatives. When a Court, on the other hand, pronounces a judgment *in rem*, it determines the title to a thing, e.g., a ship, not as between *A* and *X*, but as regards *A* against all the world. The judgment, therefore, is conclusive against the whole world (h). The same remark applies in principle to a sentence of divorce, for the sentence determines that *H* and *W*, the divorced persons, are, as regards all the world, to be regarded as unmarried persons.

The principle that a foreign judgment is conclusive and unimpeachable upon its merits holds good whether the judgment be relied upon by the plaintiff or by the defendant (i).

(a) L. R. 6 Q. B. 139.

(b) *Ibid.*, 155.

(c) *In re Henderson, Nouvion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 256, per Lindley, L. J.

(d) *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Schibbsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

(e) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414.

"By the comity which is paid by us to the judgment of other Courts abroad "of competent jurisdiction we give a full and binding effect to such judgments, "as far as they profess to bind the persons and property immediately before "them in judgment." *Power v. Whitmore* (1815), 4 M. & S. 141, 150, judgment of Ellenborough, C. J.

(f) *Harvey v. Farnie* (1882), 8 App. Cas. 43.

(g) *Doglioni v. Crispin* (1866), L. R. 1 H. L. 301; *In re Trufort* (1887), 36 Ch. D. 600, 611.

(h) Compare Story, ss. 591, 592.

(i) *Burrows v. Jemino* (1726), 2 Str. 733; *Plummer v. Woodburne* (1825), 4 B. & C. 625; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Henderson v. Henderson* (1843), 3 Hare, 100.

Illustrations (*k*).

1. *A* obtains a foreign judgment against *X* for a debt due from *X* to *A*. The judgment is conclusive, and *X* cannot, in an action on the judgment in England, show that the debt was not really owing from *X* to *A* (*l*).

2. *A* sues *X* in a French Court for breach of an English charter-party, in which is a clause, "penalty for the non-performance of this agreement, estimated amount of freight." The foreign Court, under an erroneous view of English law, treat this clause as fixing the amount of damages recoverable, and therefore give judgment in favour of *A* for 700*l.*, the amount of the freight. The judgment, though given under a mistaken view of English law, is conclusive (*m*).

3. *A* brings an action in England for 200*l.* due to *A* from *X* under a judgment of a New York Court. The judgment is founded on a mistaken view of the law of New York. The judgment is conclusive (*n*).

4. *A* obtains a judgment for debt against *X* in a Canadian Court. *X*, at the time the action is brought in Canada, has been made bankrupt in England, and might have pleaded the bankruptcy in defence to the action. The bankruptcy is not pleaded in Canada. The Canadian judgment is conclusive (*o*).

5. *H* is domiciled in Scotland; he marries *W*, an Englishwoman, in England. Whilst they are domiciled in Scotland, *H* obtains a divorce from *W* in a Scottish Court for a cause for which divorce could not be obtained in England. The sentence of divorce is conclusive (*p*).

RULE 113.—A valid foreign judgment has the effects stated in Rules 114 to 121, and these effects depend upon the nature of the judgment.

(*k*) In these illustrations it is assumed that the Court is a Court of competent jurisdiction.

(*l*) *Tarleton v. Tarleton* (1815), 4 M. & S. 20.

(*m*) *Godard v. Gray* (1870), L. R. 6 Q. B. 139. See also *Castrique v. Imrie* (1870), L. R. 4 H. L. 414.

(*n*) *Scott v. Pilkington* (1862), 2 B. & S. 11; 31 L. J. Q. B. 81. Conf. *De Cosse Brissac v. Rathbone* (1861), 6 H. & N. 301; 30 L. J. Ex. 238; and contrast *Meyer v. Ralli* (1876), 1 C. P. D. 358, which (*semble*) is wrongly decided.

(*o*) *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228.

(*p*) *Harvey v. Farnie* (1882), 8 App. Cas. 43. Compare *Scott v. Attorney-General* (1886), 11 P. D. 128.

Comment.

The validity or the conclusiveness of a foreign judgment does not necessarily involve the enforceability thereof in England. The extent to which a foreign judgment, even when valid, can be enforced, or what in other words are its effects in England, is to be determined in accordance with Rules 114 to 121 (*q*).

II. PARTICULAR KINDS OF JUDGMENTS (*r*).

(A) JUDGMENT *in Personam*.

(a) *As Cause of Action*.

RULE 114.—Subject to the possible exception hereinafter mentioned, a valid foreign judgment *in personam* may be enforced by an action for the amount due under it if the judgment is

(1) for a debt (*s*), or definite sum of money, and

(2) final and conclusive (*t*),

but not otherwise.

Provided that a foreign judgment may be final and conclusive, though it is subject to an appeal, and though an appeal against it is actually pending in the foreign country where it was given (*u*).

Comment.

There is no mode of directly enforcing a foreign judgment in England (unless it be a Scottish or Irish judgment or the judg-

(*q*) See pp. 448—469, *post*.

(*r*) See, for authorities as to Foreign Judgments, note (*a*), p. 429, *ante*.

(*s*) *Sadler v. Robins* (1808), 1 Camp. 253; *Henderson v. Henderson* (1844), 6 Q. B. 288; *Nouvion v. Freeman* (1889), 15 App. Cas. 1.

(*t*) *Plummer v. Woodburne* (1825), 4 B. & C. 625; *Henley v. Soper* (1828), 8 B. & C. 16; *Paul v. Roy* (1852), 15 Beav. 433; *Patriok v. Shedden* (1853), 2 E. & B. 14; 22 L. J. Q. B. 283; *Frayes v. Worms* (1861), 10 C. B. (N. S.) 149; 2 Sm. L. C. (9th ed.), p. 882.

(*u*) *Nouvion v. Freeman* (1889), 15 App. Cas. 1, 13, language of Lord Watson; *Nouvion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 255, judgment of Lindley, L. J.; *Scott v. Pilkington* (1832), 2 B. & S. 11. As to when a judgment is final, see *Jeannot v. Fuerst* (1909), 25 T. L. R. 424; *Harrop v. Harrop*, [1920] 3 K. B. 386; (1920), 36 T. L. R. 635; *In re Macartney, Macfarlane v. Macartney*, [1921] 1 Ch. 522, 531, 532; *McDonnell v. McDonnell*, [1921] 2 Ir. R. 148.

ment of a Court of some British possession) (*x*) by execution, but a valid foreign judgment for a debt or fixed sum of money, may be enforced by an action on the part of the person in whose favour the judgment is given (generally the plaintiff in the foreign proceedings) for the sum due under the judgment.

As to conditions of enforceability.—The possibility of enforcing a foreign judgment by action, or of bringing (to use the technical term) “an action on the judgment,” is subject to two conditions, each of which is essential to the maintenance of the action.

First, the judgment must be a judgment for a *debt* (*y*). It must order *X*, the defendant in the English action, to pay to *A*, the plaintiff, a definite and actually ascertained (*z*) sum of money; if it orders him to do anything else, *e.g.*, specifically perform a contract, it will not support an action.

Secondly, the judgment must be “*final and conclusive*.”

“There is [often] a little misapprehension as to what is meant “by the word ‘final.’ We require a foreign judgment to be a “final one, that is to say, it must not be merely what we should “call here an interlocutory order, an order not purporting to “decide the rights of the parties, but merely requiring something “to be done pending the prosecution of the action, either for the “purpose of security, or of keeping things as we say *in statu quo* “until the trial of the action” (*a*).

The reason for this is that “to give effect . . . in this country “to a . . . judgment [which is not final in the country where “it is given] would enable the plaintiff to obtain in this country “a greater benefit from it than he could obtain from it in [the “country where it is given]. It would be entirely contrary to “the principle on which English Courts proceed in enforcing a “foreign judgment, if we were to adopt that course” (*b*).

The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata*. “In order to establish that [a “final and conclusive] judgment has been pronounced, it must be

(*x*) See Rules 116, 117, pp. 458, 462, *post*.

(*y*) *Henley v. Soper* (1828), 8 B. & C. 16. Contrast *Sheehy v. Professional Life Assurance Co.* (1857), 2 C. B. (N. S.) 211 (collateral order to pay costs).

(*z*) *Sadler v. Robins* (1808), 1 Camp. 253. Compare *Hall v. Odber* (1809), 11 East, 118.

(*a*) *Nouvion v. Freeman* (1887), 37 Ch. D. (C. A.) 244, 251, judgment of Cotton, L. J.

(*b*) *Ibid.*, 249, judgment of Cotton, L. J. Compare Intro., General Principles Nos. I. and V., pp. 23, 59, *ante*.

“shown that in the Court by which it was pronounced, it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties” (c).

“No decision has been [or can be] cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear to me, when fairly read, to assume that the decree which was given effect to had been pronounced *causâ cognitâ*, and that it was unnecessary to inquire into the merits of the controversy between the litigants, either because these had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence” (d).

As to proviso.—“In order to its receiving effect here, a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher Court; but it must be final and unalterable in the Court which pronounced it; and if appealable the English Court will only enforce it, subject to conditions which will save the interests of those who have the right of appeal” (d).

“The fact that a judgment or order may be appealed from, or that it is made in a summary proceeding, does not prevent it from being *res judicata* and actionable in this country” (e).

“Though the pendency of an appeal in the foreign Court might afford ground for the equitable interposition of [the English] Court to prevent the possible abuse of its process, and on proper terms to stay execution in the action, it could not be a bar to the action itself” (f).

Illustrations.

1. A brings an action against X in a French Court for breach of contract, and obtains judgment for 1,000*l*. An action for 1,000*l*. is maintainable in England by A against X on the judgment (g).

(c) *Nouvion v. Freeman* (1889), 15 App. Cas. 1, 9, judgment of Lord Herschell.

(d) *Nouvion v. Freeman* (1889), 15 App. Cas. 1, 13, judgment of Lord Watson.

(e) *Nouvion v. Freeman*, 37 Ch. D. 244, 255, judgment of Lindley, L. J.

(f) *Scott v. Pilkington* (1862), 2 B. & S. 11, 41, *per Curiam*.

(g) See *Godard v. Gray* (1870), L. R. 6 Q. B. 139; *Rousillon v. Rousillon*

2. *A* recovers judgment against *X* for 1,000*l.* in a colonial Court of Equity in respect of equitable claims. Action maintainable (*h*).

3. *A* recovers judgment in a Colonial Court against *X* for the payment of 600*l.*, the balance due on a partnership debt, and 53*l.* costs. Action maintainable (*i*).

4. *A* recovers judgment against *X* in a Jamaica Court, that *X* should pay *A* 3,000*l.*, after first deducting thereout *X*'s costs, to be taxed by the proper officer. The costs have not been taxed. The judgment is not a judgment for a fixed sum. No action maintainable (*k*).

5. *A* obtains a judgment of the Scottish Court of Session against *X*, ordering *X* to pay 500*l.* to *A* on certain terms, pending an appeal by *X* to the House of Lords. It is in effect an interlocutory order for the payment of costs. No action maintainable (*l*).

6. *A* takes certain summary or "executive" proceedings against *X* in a Spanish Court for the recovery of a debt, and obtains a so-called *remate* judgment for 10,000*l.* The judgment is final in these proceedings, subject, however, to reversal on appeal. In these executive proceedings *X* can set up certain limited defences, but cannot dispute the validity of the contract under which the debt arises. Either party, if unsuccessful in the executive proceedings, may in the same Court and in respect of the same matter take ordinary or (so-called) plenary proceedings in which all defences may be set up, and the merits of the matter may be gone into. In the plenary proceedings a *remate* judgment cannot be set up as *res judicata* or otherwise, and a plenary judgment renders the *remate* judgment inoperative. The *remate* judgment is not final and conclusive. No action maintainable on the *remate* judgment (*m*).

(1880), 14 Ch. D. 351. As to the rate of exchange for conversion of amounts awarded in foreign currency, see Rule 181, p. 659, *post*.

The words "in England" are inserted in this first illustration to remind the reader that the illustrations refer only to proceedings in England. The words "action maintainable," or "no action maintainable," in the subsequent illustrations, mean that *A*, who obtains the foreign judgment, can or cannot enforce it by action in England.

(*h*) *Henderson v. Henderson* (1844), 6 Q. B. 288.

(*i*) *Henley v. Soper* (1828), 8 B. & C. 16.

(*k*) *Sadler v. Robins* (1808), 1 Camp. 253.

(*l*) *Patrick v. Shedden* (1853), 22 L. J. Q. B. 283; 2 E. & B. 14. Compare *Paul v. Roy* (1852), 15 Beav. 433; see *Plummer v. Woodburne* (1825), 4 B. & C. 625.

(*m*) *Nouvion v. Freeman* (1889), 15 App. Cas. 1.

7. *A*, in an action in New York, recovers judgment against *X* for 3,000*l*. *X* appeals against the judgment to the New York Court of Appeal. An appeal under the law of New York is not a stay of execution. While the appeal is pending *A* brings in England an action against *X* on the judgment for 3,000*l*. The action is maintainable (*n*).

8. *W* obtains in a British protected State a maintenance order against *H*. With a view of enforcing the order it is necessary for *W* to apply to the local Court, and on such application the Court may vary or rescind the order as it thinks fit. *W* cannot bring an action in England, founded on the judgment of the local Court, as that judgment is not final and conclusive (*o*).

Exception (p).—An action (*semble*) cannot be maintained on a valid foreign judgment if the cause of action in respect of which the judgment was obtained was of such a character that it would not have supported an action in England.

Comment.

Transactions which give rise to a right of action in a foreign country may be such that they would not support an action in England (*q*). If, then, *A* recovers judgment in a foreign, *e.g.*,

(*n*) *Scott v. Pilkington* (1862), 2 B. & S. 11; *conf.* especially, p. 41, judgment of Cockburn, C. J.

(*o*) *Harrop v. Harrop*, [1920] 3 K. B. 386; *McDonnell v. McDonnell*, [1921] 2 Ir. R. 148. The point was raised in *Harrop v. Harrop*, but not decided, whether the original action was not a penal action, upon which an action in England could not be founded. Compare *In re Macartney, Macfarlane v. Macartney*, [1921] 1 Ch. 522. An action lies to recover costs awarded in a divorce suit by a foreign Court, *Russell v. Smyth* (1842), 9 M. & W. 810, or damages against a co-respondent. See Sub-Rule to Rule 98, p. 419, *ante*.

(*p*) See *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Huntington v. Attrill*, [1893] A. C. 150; (1892), 146 U. S. 657; *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265; *De Brimont v. Penniman* (1873), 10 Blatch. 436; *In re Macartney, Macfarlane v. Macartney*, [1921] 1 Ch. 522, 529, 530; see Freeman, Judgments, s. 588. It may be noted that the provisions in the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), for the reciprocal enforcement within the British dominions of judgments exclude judgments "in respect of a cause of action "which for reasons of public policy or for some other similar reason could not "have been entertained" by the Court from which enforcement of the judgment is asked for. See s. 9, sub-s. (2) (*f*).

(*q*) See as to Penal Actions, Rule 54, p. 230, *ante*, and especially *Huntington v. Attrill* (1892), 146 U. S. 657. As to Torts, see Rules 187—189, *post*; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1; *The Halley* (1868), L. R. 2 P. C. 193.

in a Belgian, Court for 100*l.* against *X* in respect to some act which would not itself support an action in England, can *A* enforce the Belgian judgment in England by means of an action? On principle this question ought to be answered in the negative, but the question has never, it would appear, come directly before our Courts, and the authorities from which a reply can be drawn are not absolutely conclusive.

Illustrations.

1. In a penal action brought in New York by *A*, a government official, against *X*, a citizen of New York, *A* recovers judgment for 100*l.* *X* is in England. *A* brings an action against *X* on the judgment for 100*l.* The action is (*semble*) not maintainable (*r*).

2. *X*, a Swiss, enters into a contract in France with *A*, a French subject, in regard to acts to be done in England. The contract, though valid by French law, is void by English law as being in restraint of trade and against public policy. *A* cannot maintain an action in England for any breach of the contract. *X* breaks the contract. *A* brings an action against *X* in France for the breach of contract and recovers 1,000*l.* *A* then brings an action on the French judgment for the 1,000*l.* against *X*, who is in England. *Semble*, the action is not maintainable (*s*)?

3. Under the Code Napoléon, a father-in-law is bound under certain circumstances to make an allowance to his son-in-law if in want, as long as a child of the marriage of the son-in-law with the daughter of the father-in-law is living.

A, a Frenchman, domiciled in France, marries in France *N*, the daughter of *X*, an Englishman, domiciled in England. While *A* and *X* are residing in France, *A* takes proceedings and obtains a judgment against *X*, his father-in-law, for the payment of an

(*r*) See *Attorney-General for Canada v. Schulze* (1901), 9 Sc. L. T. 4; costs awarded by a judgment in Canada on a revenue case are irrecoverable in Scotland. Compare *Huntington v. Attrill*, [1893] A. C. 150, where it seems assumed that if the original action had been a penal action, an action would not have been maintainable in England on the judgment given in the original action. Compare especially the language of the Supreme Court in *Wisconsin v. Pelican Co.* (1888), 127 U. S. 265, 290, 291. In *Municipal Council of Sydney v. Bull*, [1909] 1 K. B. 7, an action based on a New South Wales Act authorizing the municipality to recover the cost of improvements from property owners failed partly on this ground and partly as affecting land out of England. An action would apparently not have lain on a New South Wales judgment under the Act.

(*s*) This illustration is suggested by *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, where, however, the point does not directly arise.

allowance under the Code Napoléon. Part of the allowance is not paid. *A* brings an action in England against *X* (who is in England) for the unpaid part of the allowance as for a debt due on the judgment. *Semble*, the action is not maintainable (*t*).

4. *X*, an Englishman domiciled in England, dies leaving property there and in Malta. After his death, *A*, a daughter, is born to him by a Maltese lady to whom he had been engaged to be married. Affiliation proceedings on behalf of *A* are taken in Malta against the administrator of *X*'s Maltese estate. The Court makes an order for the annual payment of a sum of money for the benefit of *A*. In an administration action in England the question is raised whether the order of the Maltese Court can be enforced against the assets of *X* in the hands of the English administrator. The action is not maintainable (*u*).

5. *A* recovers judgment in a foreign Court against *X* for 300*l.*, the amount of a gambling debt due by *X* to *A*. An action of this kind cannot be brought in an English Court. *A* brings an action in England on the foreign judgment. The action is not maintainable (*x*).

SUB-RULE.—A valid foreign judgment does not of itself extinguish the original cause of action in respect of which the judgment was given (*y*).

(*t*) In the United States it has been held that such an action is not maintainable. See *De Brimont v. Penniman* (1873), 10 Blatch. 436; Wharton, s. 104 *b*; *Harrop v. Harrop*, [1920] 3 K. B. 386, 390, 391.

Note that the judgment of the United States Court decides two different points. *First*, that in the United States no action was maintainable for the allowance. *Secondly*, that if no action was maintainable for the allowance, no action was maintainable on the French judgment for the portions of the allowance which were due under it.

(*u*) *In re Macartney, Macfarlane v. Macartney*, [1921] 1 Ch. 522, 529, 530. No action would lie in England to obtain an affiliation order for a posthumous child. The case, however, was not decided on this point alone; it was also held (1) that it might be contrary to public policy to enforce a decision of a foreign Court giving permanent maintenance to an illegitimate child, and (2) that in any case the judgment relied upon was not final and conclusive, since on application to the Maltese Court it might be varied. See *Harrop v. Harrop*, [1920] 3 K. B. 386.

(*x*) See the Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18. In *Vadala v. Lawes* (1890), 25 Q. B. D. (C. A.) 310 (p. 438, note (*p*), *ante*), even had the judgment been obtained, without fraud, on gambling debts, it would not have been possible to sue upon it in England. *Quarrier v. Colston*, 1 Ph. 147, in which case a claim for bets won abroad was allowed, was decided in 1842, before the Act of 1845.

(*y*) *Smith v. Nicolls* (1839), 5 Bing. N. C. 208; *Hall v. Odber* (1809), 11

Comment.

The judgment of an English Court of record extinguishes the original cause of action (*z*). If *A* in such a Court recovers judgment for 20*l.* against *X* for a breach of contract or tort, he can issue execution or bring an action against *X* on the judgment, but he cannot bring an action against *X* for the breach of contract, or the tort. A foreign judgment does not extinguish the original cause of action. If *A* recovers in a French Court judgment for 20*l.* against *X* for a debt, he may in England bring an action on the judgment, and he may also, if he chooses, bring an action for the debt.

Illustration.

A, in an action in a Victorian Court against *X* for breach of contract, recovers judgment for 100*l.* The judgment is neither wholly nor in part satisfied. *A* can bring an action in England against *X* for the breach of the contract (*a*).

(*b*) As Defence.

RULE 115 (*b*).—A valid foreign judgment *in personam*, if it is final and conclusive (*c*) on the merits (*d*) (but not otherwise), is a good defence to an action for the same matter when either

- (1) the judgment was in favour of the defendant (*e*),
or,

East, 118; 10 R. R. 443; *Bank of Australasia v. Harding* (1850), 9 C. B. 661; 19 L. J. C. P. 345; *Bank of Australasia v. Nias* (1851), 16 Q. B. 717; 20 L. J. Q. B. 284; *Kelsall v. Marshall* (1856), 1 C. B. (N. S.) 241; 26 L. J. C. P. 19; *Castrique v. Behrens* (1861), 30 L. J. Q. B. 163. Piggott argues that this sub-rule is in principle unsound (see Piggott (3rd ed.), pp. 18—30), and there is considerable force in his arguments. But the authorities for it are too strong to be disputed anywhere but in a Court of Appeal. See Westlake, s. 332; Story (8th ed.), s. 599 *a*; Bullen & Leake (7th ed.), p. 171.

(*z*) Leake, *Law of Contracts* (6th ed.), pp. 683, 689, 690; Anson, *Law of Contract* (15th ed.), p. 394; *Ex parte Bank of England*, [1895] 1 Ch. 37.

(*a*) See cases cited in note (*y*), p. 454, *ante*.

(*b*) See Westlake, s. 333, p. 414; Foote, pp. 537—539.

(*c*) As to meaning of "final and conclusive," see p. 449, *ante*.

(*d*) *Harris v. Quine* (1869), L. R. 6 Q. B. 653.

(*e*) *Plummer v. Woodburne* (1825), 4 B. & C. 625; *General Steam Navigation Co. v. Guillo* (1843), 11 M. & W. 877; *Ricardo v. Garcias* (1845), 12 Cl. & F. 368; *Société Générale de Paris v. Dreyfus Brothers* (1887), 37 Ch. D. 215. Compare *Booth v. Leicester* (1837), 1 Keen, 579.

(2) the judgment being in favour of the plaintiff has been satisfied (*f*).

Comment.

(1) *Judgment for Defendant*.—A foreign judgment in favour of the defendant in the foreign action is a complete answer to any proceedings here for the same matter by the plaintiff in such action, provided that the judgment be final and conclusive on the merits, but it is not an answer to an action in England if it be merely an interlocutory judgment, or a judgment which, though it decides the cause finally in the country where it is brought, does not purport to decide it on the merits, *e.g.*, if it is given in favour of the defendant on the ground that the action is barred by a statute of limitations (*g*). Nor is it an answer to an action seeking a different form of relief (*h*).

(2) *Judgment for Plaintiff*.—So, again, a foreign judgment in favour of the plaintiff which purports to be final and conclusive on the merits is, if followed by effective execution or satisfaction, an answer to any action brought by the plaintiff, but “a judgment “of a foreign or colonial Court against the defendant does not “operate as a merger of the original cause of action (*i*), and if “not followed by execution or satisfaction affords no defence to a “subsequent action brought in this country for the same “claim” (*k*).

Illustrations.

1. *A* brings an action in a Victorian Court against *X* for breach of contract. *X* denies the breach. A judgment which is final and conclusive in Victoria is given in favour of *X*. The judgment is a defence to an action in England against *X* by *A* for the same breach of contract (*l*).

(*f*) *Smith v. Nicolls* (1839), 5 Bing. N. C. 208; *Barber v. Lamb* (1860), 8 C. B. (N. S.) 95; 29 L. J. C. P. 234; compare *Taylor v. Hollard*, [1902] 1 K. B. 676.

(*g*) *Harris v. Quine* (1869), L. R. 4 Q. B. 653.

(*h*) *E.g.*, a suit for damages still lies even if a foreign Court has refused to rescind a contract. *Callendar v. Ditricks* (1842), 4 M. & Gr. 68. On the other hand, a mere change in the form of action is immaterial. *The Griefswald* (1859), Swabey, 430, 435. But the same relief may be asked based on a different case giving rise to a new equity. *Hunter v. Stewart* (1861), 31 L. J. Ch. 346; contrast *Henderson v. Henderson* (1843), 3 Hare, 115.

(*i*) See Sub-Rule, p. 454, *ante*.

(*k*) Bullen & Leake (7th ed.), p. 616.

(*l*) See Bullen & Leake, p. 616. Compare *Plummer v. Woodburne* (1825), 4 B. & C. 625. See also *Ricardo v. Garcias* (1845), 12 Cl. & F. 368.

2. *A* brings an action, in the Consular Court of Constantinople, against *X* for a debt of 1,000*l.*, and recovers judgment for 45*l.* The 45*l.* are thereupon paid by *X*. *A* thereupon brings an action in England against *X* for the same debt. The judgment of the Consular Court is an answer to the action (*m*).

3. *A* recovers judgment in England against *X* for 15,000*l.* He afterwards brings an action against *X* on the judgment in a South African Court. This Court goes into the merits of *A*'s original claim, and gives judgment in his favour, but only for 10,000*l.* *A* obtains payment of the 10,000*l.* under the judgment of the South African Court. *A* afterwards brings an action in England on the English judgment for the balance of 5,000*l.* The South African judgment is (*semble*) an answer to the action (*n*).

4. *A* brings an action, in the Consular Court of Constantinople, against *X* for a debt of 1,000*l.*, and recovers judgment for 45*l.* and costs. *A* obtains no satisfaction for the judgment. *A* brings an action in England against *X* for the 1,000*l.* The judgment of the Consular Court, not having been satisfied, is not an answer to the action (*o*).

5. *X*, in October, 1862, incurs a debt to *A*, in the Isle of Man. In 1866, *A* brings an action against *X* for the debt in a Manx Court. Under a Manx statute no action for the debt can be brought more than three years after the cause of action accrues, but the statute does not extinguish the debt. The Manx Court gives judgment in favour of *X* on the ground that the action is barred by the statute. The judgment is not conclusive on the merits. *A* brings an action for the debt in England. The Manx judgment is not an answer to the action (*p*).

(*m*) *Barber v. Lamb* (1860), 8 C. B. (N. S.) 95; 29 L. J. C. P. 234.

(*n*) *Taylor v. Hollard*, [1902] 1 K. B. 676, 681, judgment of Jelf, J. *A* has in effect elected to take the foreign judgment in discharge of his whole cause of action, and cannot afterwards sue for the residue of the original judgment debt in England.

(*o*) Compare *Barker v. Lamb* (1860), 8 C. B. (N. S.) 95.

(*p*) *Harris v. Quine* (1869), L. R. 4 Q. B. 653. Compare *Frayes v. Worms* (1861), 10 C. B. (N. S.) 149.

(c) *Extension of Certain Judgments in Personam of Superior Courts in one Part of the British Dominions to any other Part (g).*

RULE 116(r).—A judgment of a Superior Court in any part of the United Kingdom for any debt, damages, or costs, has, on a certificate thereof being duly registered in a Superior Court of any other part of the United Kingdom, from the date of such registration the same force and effect as a judgment of the Court in which the certificate is registered, and may be enforced by execution, or otherwise, in the same manner as if it had been a judgment originally obtained at the date of such registration.

(g) See Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), and the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), Part II.

For extension of judgments of Inferior Courts in the United Kingdom, see Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31). For the enforcement of maintenance orders in different parts of the British dominions, see the Maintenance Orders (Facilities for Enforcement) Act, 1920 (10 & 11 Geo. 5, c. 33).

(r) See the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), ss. 1—4, 8. This Rule is intended simply to give the general result of the Act as regards the extension of judgments throughout the United Kingdom. It does not follow the precise words of the Act even in regard to the sections referred to. Thus, as pointed out subsequently in the comment (see p. 460), what is enforced in the country where a certificate is registered is, in strictness, not the judgment, but the certificate of the judgment. The Act, further, as it originally stood, applied in England and Ireland only to judgments of the Superior Courts of Common Law. For its extension, as regards the kind of judgments to which it applies, to every Division of the High Court in England or in Ireland, see the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 76; *Fontaine's Case* (1889), 41 Ch. D. (C. A.) 118; the Judicature Act (Ireland), 1877 (40 & 41 Vict. c. 57), s. 71. For all details as to procedure, &c., the Judgments Extension Act, 1868, should itself be carefully consulted. See also *In re Watson*, [1893] 1 Q. B. (C. A.) 21; *In re Low*, [1894] 1 Ch. (C. A.) 147; *In re A Bankruptcy Notice*, [1898] 1 Q. B. (C. A.) 383; *Thompson v. Gill*, [1903] 1 K. B. (C. A.) 760; *Galbraith v. Grimshaw*, [1910] 1 K. B. (C. A.) 339; A. C. 508.

It may also be well to note that the provisions of that Act, in so far as they regard the extension of an Irish judgment to Scotland, or of a Scottish judgment to Ireland, do not in strictness belong to the subject of this treatise.

The Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict. c. 31), extends the judgments of Inferior Courts, *e.g.*, County Courts or Civil Bill Courts, in one part of the United Kingdom, to other parts of the United Kingdom, by provisions analogous to those of the Judgments Extension Act, 1868. No reference to the Inferior Courts Judgments Extension Act is made in this Digest.

tration as aforesaid in the Court in which the certificate is registered.

The term "Superior Court" means in this Rule,

- (1) as applied to England, the High Court of Justice in England;
- (2) as applied to Ireland(*s*), the High Court of Justice in Northern or Southern Ireland;
- (3) as applied to Scotland, the Court of Session in Scotland.

This Rule does not apply to any judgment (decreet) pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland (*t*).

Comment.

First. This Rule applies only to a judgment for "debt, damages, or costs." It applies, therefore, only to that kind of judgment which is enforceable by action in the Courts of the different parts of the United Kingdom (*u*).

Hence, as has been laid down in a Scottish case, "equity judgments are excluded, and all judgments and decrees *ad facta præstanda*, or of the nature of prohibitions or injunction" (*x*); and so also are judgments in actions for the recovery of land, and in probate and divorce suits (*y*), at any rate if the judgment in such an action or suit is a judgment for anything more than damages or costs; for if a party to one of these proceedings should, as might be the case, recover judgment only for damages or costs, there does not appear to be any reason why such a judgment, if

(*s*) Under the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), s. 41, the Judgments Extension Act, 1868, is made applicable to the High Courts of Southern and Northern Ireland, and to these Courts *inter se*.

(*t*) "The Act shall not apply to any decret pronounced in absence in an action proceeding on an arrestment used to found jurisdiction in Scotland." (31 & 32 Vict. c. 54, s. 8.) If, however, the defendant appears to defend the action, and judgment is given against him, it can be enforced under the Act; contrast the rule regarding suing on foreign judgments, p. 403, *ante*. In *re Low*, [1894] 1 Ch. (C. A.) 147.

(*u*) Compare Judgments Extension Act, 1868, ss. 1—3, 6, 8.

(*x*) *Wotherspoon v. Conolly* (1871), 9 M. 310. See *In re Howe Machine Co.* (1889), 41 Ch. D. 118; Piggott, *Foreign Judgments*, pt. iii., pp. 154—156.

(*y*) *Duncan & Dykes, Principles of Civil Jurisdiction*, pp. 308, 309. A judgment awarding damages against a co-respondent might be enforced under the Act. See *Rayment v. Rayment*, [1910] P. 271, 291.

recovered, *e.g.*, in Scotland, should not be capable of registration in England.

Secondly. Under this Rule a judgment obtained in one part of the United Kingdom, *e.g.*, in Ireland, can by formal proceedings, as to the details of which the reader should consult the Judgments Extension Act, 1868, be extended to and rendered effective in any other part of the United Kingdom, *e.g.*, in England (*z*).

Though "judgments" are in the Judgments Extension Act, 1868, itself described as "registered" (*a*), it is in strictness the "certificate" of a judgment which is registered, and it is also in strictness the certificate, not the judgment, which is given effect to as a judgment of the Court, *e.g.*, the English High Court, in which the registration takes place. The Superior Courts of the different parts of the United Kingdom have, at any rate, as far as relates to execution, full control and jurisdiction over any certificate or judgment registered in conformity with Rule 116 (*b*), and a certificate cannot be registered more than twelve months after the date of the original judgment without the leave of the Court or a judge of the Court where it is, to be registered. This Court, *e.g.*, the English High Court, has authority to prevent execution issuing under the judgment in England, and generally to exercise full control at any rate over the certificate which is the thing actually registered. The certificate, therefore, would be set aside for an irregularity appearing on the face of it (*c*); and execution would not be allowed to issue if the Court where the certificate is registered were properly certified that a stay of execution had

(*z*) 31 & 32 Vict. c. 54, s. 1.

(*a*) *Ibid.*, ss. 4, 6.

(*b*) See *Ibid.*, s. 4. "The Courts of Common Pleas at Westminster and at Dublin and the Court of Session in Scotland shall have and exercise the same control and jurisdiction over any judgment or decree, and over any certificate of such judgment or decree, registered under this Act in such Courts respectively as they now have and exercise over any judgment or decree in their own Courts, and in so far only as relates to execution under this Act."

The judgment itself is in this section treated as registered. The authority of the Courts is limited to that which they "now," *i.e.*, in 1868, have, and, lastly, it is, in so far as this enactment is concerned, given them in so far only as relates to execution.

Note that it is not necessary that the registering Court should have jurisdiction over the defendant. *Wotherspoon v. Conolly* (1871), 9 M. 310; *English's Coasting and Shipping Co., Ltd. v. British Finance Co., Ltd.* (1886), 14 R. 220, 225, 226, per Inglis, L. P.

(*c*) See *Part v. Scannell* (1875), Ir. R. 9 C. L. 426.

been granted by the Court in which the judgment had been obtained (*d*).

Thirdly. The Court in which a certificate is registered under Rule 116 cannot apparently inquire into the validity of the original judgment. Thus if a judgment of the Court of Session be registered in England, the High Court in England cannot, it is submitted, set aside the certificate (as long as the judgment stands in Scotland) on the ground that the judgment was obtained by fraud. If the certificate is to be got rid of on that ground, the judgment must be impeached by proceedings in Scotland (*e*).

Fourthly. Rule 116 in no way negatives the right of a plaintiff who has obtained a judgment in one part of the United Kingdom, *e.g.*, Scotland, to bring an action upon it in another part, *e.g.*, England. The plaintiff, however, who brings such an action exposes himself to one, and perhaps to two, disadvantages. He cannot in general recover any costs (*f*), and, if the view here taken of the Act is correct, he gratuitously runs the risk of having the judgment impeached for fraud and for other grounds of invalidity which are not available against a registered judgment.

Fifthly. A proceeding on arrestment in Scotland is a mode of asserting the jurisdiction of the Scottish Courts over a defendant who, though not in Scotland, possesses property there (*g*). The reason why a judgment obtained in such an action is not allowed to be registered (*h*) is that, as our Courts do not consider the possession of property to be a sufficient ground of jurisdiction in an action *in personam*, a judgment which depended upon the existence of such jurisdiction could not be enforced by action in

(*d*) This is specially provided for in the case of judgments of the Court of Session which it is proposed to register in the High Court of England or of Ireland (see 31 & 32 Vict. c. 54, s. 3), and there can be no doubt that if a stay of execution were granted by the English or Irish High Court where a judgment was obtained, the Court of Session on being certified thereof would not allow execution to issue in Scotland.

(*e*) *In re Low, Bland v. Low*, [1894] 1 Ch. (C. A.) 147, 162, 163, per Davey, L. J.

(*f*) 31 & 32 Vict. c. 54, s. 6.

(*g*) The validity of such jurisdiction has been repeatedly affirmed by the House of Lords in a series of cases beginning *London and North Western Railway Co. v. Lindsay* (1858), 3 Macq. 99; *North v. Stewart* (1890), 17 R. (H. L.) 60. See also *Fergusson & Co., Ltd. v. Brown*, [1918] S. C. (H. L.) 125; *Mitchell & Muir, Ltd. v. Fenischliffe Products Co., Ltd.*, (1920) 1 Sc. L. T. 199; *Moore & Weinberg v. Ernsthause*, [1917] S. C. (H. L.) 25.

(*h*) 31 & 32 Vict. c. 54, s. 8.

England (i). Here, as elsewhere, we see that Rule 116 and the Act on which it is grounded must be strictly confined to judgments on which an action could be brought in England.

RULE 117 (k).—When Part II. of the Administration of Justice Act, 1920, is applied by Order in Council to any part of the British dominions outside the United Kingdom, a judgment creditor who has obtained a judgment in a Superior Court in such part of the British dominions under which a sum of money is made payable, may apply to a Superior Court in the United Kingdom, at any time within twelve months (or such longer period as may be allowed by the Court) after the date of the judgment, to have the judgment registered in the Court, and, if they think it is just and convenient that the judgment should be enforced in the United Kingdom, the Court may order the judgment to be registered accordingly, and from the date of registration the judgment shall be of the same force and effect, and proceedings may be taken upon it, as if it were a judgment of the Court in which it is registered.

Provided that no judgment shall be ordered to be registered if

- (a) the original Court acted without jurisdiction; or
- (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original Court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that Court; or
- (c) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original Court and did not appear, notwithstanding that he was ordi-

(i) See Rules 96 and 104, pp. 408, 429, *ante*.

(k) See the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), ss. 9—14.

narily resident or was carrying on business within the jurisdiction of that Court or agreed to submit to the jurisdiction of that Court;
or

- (d) the judgment was obtained by fraud; or
- (e) the judgment debtor satisfies the registering Court either that an appeal is pending, or that he is entitled and intends to appeal against the judgment; or
- (f) the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering Court.

Comment.

This Rule, which follows closely the terms of the Administration of Justice Act, 1920, is the outcome of proposals for arrangements for the mutual enforcement of judgments and arbitration awards throughout the Empire brought forward at the Imperial Conference of 1911. The Rule can come into operation only by the issue of an Order in Council applying it to some part of the British dominions outside the United Kingdom (*l*) in which reciprocal provision has been made for the recognition of judgments obtained in the Superior Courts of the United Kingdom, or to a territory under the protection of the Crown or in respect of which a mandate is exercised by the government of any part of the British dominions. In the case of Canada and Australia the Act may be applied either to the Federal or Provincial or State Courts, or to both sets of Courts.

The judgments to which the Rule applies are any judgments or orders in any civil proceedings whether before or after the passing of the Act of 1920, providing for the payment of a sum of money, and include awards in arbitration proceedings if these can, under the law in force where they are made, be enforced in the same manner as judgments. Rules of Court must provide for service on the judgment debtor of notice of registration of a judgment, and fix a time during which execution of the judgment shall be suspended to enable the debtor to apply to have the regis-

(*l*) Including, of course, the Channel Islands and the Isle of Man.

tration set aside, and on application the Court may set aside the registration on such terms as it thinks fit. The Court, moreover, has the same control and jurisdiction over the execution of the judgment as it has over judgments given by itself.

The cases in which registration is forbidden agree in general with those in which recognition would be refused to judgments of foreign Courts (*m*), but it is expressly provided that the pendency of an appeal or the intention of the judgment debtor to exercise a right of appeal appertaining to him will bar registration. A point of some obscurity is presented by paragraph (c) of the proviso to the Rule. It appears that ordinary residence or carrying on business within the jurisdiction of the Court, or agreement to submit to its jurisdiction, is a ground for the exercise of jurisdiction unless the defendant "was not duly served with the process of the Court and did not appear." Due service here can hardly mean service within the jurisdiction, which would often be impossible in the case of a mere agreement to accept the jurisdiction, and the right of an oversea Court to exercise jurisdiction against an absent defendant on the ground of ordinary residence or carrying on business appears thus to be conceded (*n*).

It should be noted that in every case the exercise of jurisdiction by the registering Court is a matter entirely of discretion, and that an application is only to be granted if the Court thinks it just and convenient. The judgment creditor remains free to bring an action on the judgment in an oversea Court in the ordinary way, subject to the rule that, unless the Court otherwise orders, the plaintiff will not be entitled to recover any costs of the action, unless he has previously applied for registration of his judgment, in any case in which such registration is permissible under the terms of the Act (*o*).

Illustrations.

1. *H*, domiciled in a colony to which Part II. of the Administration of Justice Act, 1920, applies, obtains a decree of divorce from *W*, and 7,000*l.* damages against *X*, whom he cites as co-respondent, and who is resident in the colony at the time. *X* leaves the colony and proceeds to England. *A* can apply to the Court in England for the registration of the judgment against *X*.

2. In the same colony *A* obtains against *X* in an action on

(*m*) See Rules 95, 96, pp. 393, 408, *ante*.

(*n*) Compare Ord. XI. r. 1 (c); Rule 60, Exception 3, p. 258, *ante*.

(*o*) Administration of Justice Act, 1920, s. 9, sub-s. 5.

contract judgment in the Supreme Court for 8,000*l*. *A* applies in England for registration of this judgment. *X* shows that he has a right of appeal to the Court of Appeal and intends to exercise it. *A*'s application must be refused.

3. In the same colony *A* recovers judgment against *X* on account of a gambling debt. No such action would be entertained, on grounds of public policy, by an English Court (*p*). *A* cannot obtain registration of the judgment in England.

(B) JUDGMENT *in Rem*.

RULE 118 (*q*).—A valid foreign judgment *in rem* (*r*) in respect of the title to a movable gives a valid title to the movable in England to the extent to which such title is given by or under the judgment in the country where the judgment is pronounced.

Comment.

A valid foreign judgment or judicial proceeding *in rem* which either directly or indirectly determines the title to a movable is conclusive against all the world (*s*). This applies to all proceedings *in rem* against movable property within the jurisdiction of the Court pronouncing the judgment. "Whatever the Court settles "as to the right or title, or whatever disposition it makes of the "property by sale, revendication, transfer, or other act, will be "held valid in every other country, where the same question comes "directly or indirectly in judgment before any other foreign "tribunal. This is very familiarly known in the cases of proceedings *in rem*, in foreign Courts of Admiralty, whether they "are causes of prize, or of bottomry, or of salvage, or of forfeiture, ". . . over which such Courts have a rightful jurisdiction,

(*p*) The Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18.

(*q*) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Hobbs v. Henning* (1865), 34 L. J. C. P. 117; (1864), 17 C. B. N. S. 791; *Cammell v. Sewell* (1860), 5 H. & N. 728; 29 L. J. Ex. 350; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. 55; (C. A.) 460; compare Rule 152, p. 561, *post*.

(*r*) As to jurisdiction in actions *in rem*, see Rule 97, p. 413, *ante*.

(*s*) See Story, ss. 592, 593.

“founded on the actual or constructive possession of the subject-matter (*res*)” (*t*).

The real principle of a judgment *in rem* is, “that a person who acquires a valid title by the law of any country either to a chattel or to realty shall be deemed all over the world to be owner of such chattel or realty. If, therefore, the Court has absolutely the disposal of the *res*, and it is in its power, as it is in the case of a judgment *in rem* in the Admiralty Court, it does not matter who is owner; all the Courts assume that the thing has been fairly litigated, that the man brought before the Court is owner, and had such an interest as entitled him to raise the contest, and that the judgment *in rem* bound the whole” (*u*). In other words, the rule as to the effect of a judgment *in rem* is, if Rule 152 can be maintained to its full extent, merely an application of that Rule.

“In the case of *Cammell v. Sewell*” (*x*), it has been said by a very eminent judge, “a more general principle was laid down, viz., that ‘if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere.’ This, we think, as a general rule, is correct, though no doubt it may be open to exceptions and qualifications; and it may very well be said that the rule commonly expressed by English lawyers, that a judgment *in rem* is binding everywhere, is in truth but a branch of that more general principle” (*y*).

Illustrations.

1. *A* brings an action *in rem* in a French Court against a British ship, the *Ann Martin*, then in the port of Havre, and claims to be the owner of the ship. *A* obtains a judgment in his favour, and is declared to be the owner of the ship. *A* has in England the rights of owner over the *Ann Martin* against all the world (*z*).

(*t*) See Story, s. 592, cited with approval by Blackburn, J.; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 428, 429; *The Segredo* (1853), Spinks, Eccl. & Adm. 36, 57, per Dr. Lushington; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. (C. A.) 460.

(*u*) *Simpson v. Fogo* (1863), 32 L. J. (Ch.) 249, 256, judgment of Wood, V.-C.

(*x*) 5 H. & N. 728, 746.

(*y*) *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, per Blackburn, J.

(*z*) Compare *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Minna Craig Steamship Co. v. Chartered, &c. Bank*, [1897] 1 Q. B. (C. A.) 460, which

2. *A*, an Englishman, is owner of a British ship. Whilst the ship is at Havre, a French Court, honestly exercising its jurisdiction, pronounces in a proceeding *in rem* a judgment under which the ship is ordered to be sold for the payment of debts due from *M*, and is sold to *X*, a British subject. The Court has acted under a misconception of English law, and in consequence has not recognized the rights of *A* as owner. The ship is brought by *X* to England. *X* has a good title to the ship in England (*z*).

3. A British ship is seized as prize by a Russian vessel, on the ground of attempted breach of blockade, and taken to a Russian port for adjudication as prize by a prize Court. The goods on board the ship are sold under the order of the Court to *X*. It is ultimately decided by the prize Court that the ship was not lawfully captured. The title of *X*, the purchaser, to the goods is valid against that of *A*, the original owner (*a*).

RULE 119 (*b*).—A valid foreign judgment *in rem* given by a Court of Admiralty can be enforced in the High Court by proceedings against the ship or other property affected by the judgment.

Illustration.

A brings an action and obtains a judgment *in rem* in a foreign country against the City of Mecca, a British ship, then in a port of such country. The City of Mecca, the judgment not having been satisfied, comes into an English port. *A* can enforce the foreign judgment by an action *in rem* against the ship (*c*).

establishes that a judgment *in rem* against a ship gives a title to the proceeds of the sale valid against the liquidator of the company which owned the ship, and which went into liquidation before the date of the judgment.

(*z*) *Ibid.*

(*a*) See as to the principle of this case, *Stringer v. English, &c. Insurance Co.* (1870), L. R. 5 Q. B. 599, and especially p. 606, judgment of Martin, B.

(*b*) *The City of Mecca* (1881), 6 P. D. (C. A.) 106.

See Rule 61, p. 280, *ante*.

(*c*) See *The City of Mecca* (1881), 6 P. D. (C. A.) 106. In that case the Court of Appeal held that the action did not lie, but, *semble*, that the only reason for this was that the Portuguese proceedings were not based on a maritime lien, and that the judgment was therefore not a judgment *in rem*. Had it (as supposed by the Court below, 5 P. D. 28) been a judgment *in rem*, then an action *in rem* might have been brought against the ship to enforce the judgment.

(C) JUDGMENT, OR SENTENCE, OF DIVORCE.

RULE 120 (*d*).—A valid foreign judgment, or sentence, of divorce has in England the same effect as a divorce granted by the Court.

Comment.

A divorce granted by a foreign Court of competent jurisdiction (*e*) has in England the same effects as an English divorce. Restrictions imposed by the foreign law on the freedom of the divorced parties, as to marriage or otherwise, which are not imposed by an English divorce, are here inoperative. But in order that a foreign sentence of divorce should be treated as a divorce in England the sentence must be complete and final; the parties to the marriage must under it be actually divorced; it must not be a sentence which has not become complete, but is to become complete at some future date if certain conditions are fulfilled, *e.g.*, if no appeal is made against it within, say, six months. After these conditions are fulfilled the sentence is final, and the divorce is valid in England; but until they are fulfilled the parties are not in fact divorced; they have not acquired (*f*) the rights of unmarried persons, and they will not be treated in England as divorced (*g*).

Illustrations.

1. *H*, an Irishman, and *W*, an Irishwoman, marry in Ireland, where they are domiciled. They afterwards acquire a domicile in the Cape Colony. While they are there domiciled *H* is divorced from *W* by the sentence of a Cape Court on account of *W*'s adultery with *X*. The divorce is, under the law of the Cape, an absolute dissolution of the marriage, but does not allow a husband or wife divorced for adultery to re-marry whilst the injured party remains unmarried. *H* remains unmarried. *X* marries *W*, first at the Cape and afterwards in England. The marriage in England is valid (*h*).

2. *W* and *X* are respondent and co-respondent respectively in a divorce suit in India, instituted by *H*, the husband of *W*. A

(*d*) *Scott v. Attorney-General* (1886), 11 P. D. 128; *Westergaard v. Westergaard*, [1914] S. O. 977, Ct. of Sess.; *In re Stirling*, [1908] 2 Ch. 344.

(*e*) As to jurisdiction, see Rules 98, 99, pp. 416, 420, *ante*. See also *Harris v. Taylor*, [1915] 2 K. B. 580.

(*f*) See Intro., General Principle No. I., p. 23, *ante*.

(*g*) *Warter v. Warter* (1890), 15 P. D. 152.

(*h*) *Scott v. Attorney-General* (1886), 11 P. D. 128.

decree absolute dissolving the marriage of *H* and *W* is pronounced under the Indian Divorce Act, 1869, No. IV. Section 57 of that Act provides that the petitioner or the respondent may marry again after a period of six months from the date of the decree, if no appeal has been made, but not sooner. Within six months after the decree dissolving the marriage of *H* and *W*, *X* marries *W* in England. The marriage is invalid (*i*).

(D) JUDGMENT IN MATTERS OF SUCCESSION.

RULE 121 (*k*).—A valid foreign judgment in matters of succession is binding upon, and is to be followed by, the Court.

Comment.

Immovables.—A judgment as to the succession to immovables by the Courts of the foreign country where the immovables are situate (*l*) is, in so far as its effect can possibly demand the consideration of our judges (*m*), binding on English Courts.

Movables.—When once the rights of succession to the movables (wherever situate) of a testator, or intestate, who has died domiciled in a foreign country, are determined by a Court of that country, English tribunals will follow the decision of the foreign Court.

“The rule to be extracted from [the] cases appears to be this, “that although the parties claiming to be entitled to the estate

(*i*) *Warter v. Warter* (1890), 15 P. D. 152. The reason is, that *W* “was “subject to the Indian law of divorce, and she could only contract a valid second “marriage by showing that the incapacity arising from her previous marriage “had been effectually removed by the proceedings taken under that law. This “could not be done, as the Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree. “This is an integral part of the proceedings by which alone both the parties “can be released from their incapacity to contract a fresh marriage. . . . “The distinction between [the case of *Scott v. Attorney-General*] and the “present is, that there the incapacity to remarry imposed by the colonial law “only attached to the guilty party. It was, therefore, penal in its character, “and as such was inoperative out of the jurisdiction under which it was inflicted.” *Warter v. Warter*, 15 P. D. at p. 155, judgment of Hannen, President. As to penal status, see chap. xix., Rule 136, p. 500, *post*. The validity of the divorce decree itself was not questioned, but see Rule 99, p. 420, *ante*.

(*k*) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; *In re Trufort* (1887), 36 Ch. D. 600. See as to jurisdiction, Rules 97, 101, 102, pp. 413, 427, *ante*.

(*l*) See Rules 97, 101, pp. 413, 427, *ante*.

(*m*) See chap. iv., Rule 53, p. 223, *ante*.

"[i.e., movables] of a deceased person may not be bound to resort to the tribunals of the country in which the deceased was domiciled, and although the Courts of this country may be called upon to administer the estate of a deceased person domiciled abroad, and in such case may be bound to ascertain as best they can who, according to the law of the domicile, are entitled to that estate, yet where the title has been adjudicated upon by the Courts of the domicile, such adjudication is binding upon, and must be followed by, the Courts of this country" (n).

Illustrations.

1. *T*, a natural-born British subject, has under the Naturalization Act, 1870, become naturalized in Switzerland. He is at his death a Swiss citizen, but is domiciled in France. He leaves *A*, a son, whose legitimacy is disputed. *T* has bequeathed all his movables by will to *X*, which, if *A* is legitimate, he has not under Swiss law a right to do. Litigation takes place in Switzerland as to the claims of *A* and *X* respectively to *T*'s movables. The Swiss Court gives judgment (though probably on an erroneous view of English law (o)) that *A* is legitimate and entitled to succeed to nine-tenths of *T*'s movables. According to the law of France (*lex domicilii*), the right of succession to *T* depends on *T*'s nationality, and the Swiss judgment is conclusive. *T* leaves movables in England. An action is brought in England by *A* to have the Swiss judgment enforced, i.e., in effect, to have a judgment enforced which is held valid by the Courts of *T*'s domicile. The Swiss judgment is decisive, and is binding on the High Court (p).

2. *T* dies domiciled in Portugal leaving an illegitimate son, *A*. The Portuguese Court gives judgment that *A* is entitled to part of *T*'s movables. *T* leaves movables in England. The judgment of the Portuguese Court is decisive, and binds the High Court when called upon to determine right of *A* to *T*'s movables in England (q).

(n) *In re Trufort* (1887), 36 Ch. D. 600, 611, judgment of Stirling, J. See *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301, and as to the jurisdiction of the Courts of domicile, Rule 102, p. 427, *ante*.

(o) As to mistake of law, see Rule 112, p. 444, *ante*.

(p) *In re Trufort* (1887), 36 Ch. D. 600. What is really enforced is at bottom the law of *T*'s domicile, and the movables are distributed in accordance with *T*'s *lex domicilii*. See Rule 192, *post*.

(q) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

CHAPTER XVIII.

EFFECT IN ENGLAND OF
FOREIGN BANKRUPTCY;
FOREIGN GRANT OF ADMINISTRATION.

(A) FOREIGN BANKRUPTCY.

I. AS AN ASSIGNMENT.

Bankruptcy in Ireland (a), Scotland (b), or British India.

RULE 122.—An assignment of a bankrupt's property to the representative of his creditors (c)—

- (1) under the Irish Bankrupt and Insolvent Act, 1857 (d) (Irish Bankruptcy), or
- (2) under the Bankruptcy (Scotland) Act, 1913 (e) (Scottish Bankruptcy), or
- (3) under the Indian Insolvency Act, 1848 (f),

is, or operates as, an assignment to such representative of the bankrupt's

- (i) immovables (land),
- (ii) movables,

wherever situate.

Comment.

As to immovables.—An Irish, Scottish or Indian bankruptcy passes to the creditor's representative (conveniently described as the trustee) immovables of the bankrupt situate in any part of the

(a) See the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60).

(b) See the Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. 5, c. 20).

(c) In Ireland the "assignees," in Scotland the "trustee."

(d) See 20 & 21 Vict. c. 60, ss. 267, 268. See also 35 & 36 Vict. c. 58.

(e) See 3 & 4 Geo. 5, c. 20, s. 97, with which compare sect. 41.

(f) See 11 & 12 Vict. c. 21, s. 7. Compare *In re Macfadyen & Co.*, [1908] 1 K. B. 675; *Official Assignee, Bombay v. Registrar, Small Causes Court, Amritsar* (1910), 26 T. L. R. 353.

British dominions. Thus it passes to the trustee lands, *e.g.*, in Ireland, Scotland, England, the Isle of Man, India, or Victoria. It probably also passes (*g*) to the trustee immovables of the bankrupt situate in a country, *e.g.*, Italy, which does not form part of the British dominion, but passes such immovables so far, and in so far only, as the Italian Courts recognize the title of the Irish or Indian trustee.

As to movables.—An Irish, Scottish or Indian bankruptcy is an assignment to the trustee of the movables, *e.g.*, goods, of the bankrupt, situate in any part of the British dominions, and also in so far as Courts acting under the authority of the British Crown can determine the matter, of movables situate in countries not forming part of the British dominions.

Speaking generally, the statements made in the comment on Rule 81 (*h*), with regard to the extra-territorial effect of an English bankruptcy as an assignment, apply with the necessary alterations to the extra-territorial effect of an Irish, Scottish or Indian bankruptcy as an assignment.

*Bankruptcy (i) in any Foreign Country, except Ireland,
Scotland or British India.*

RULE 123.—An assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country not forming part of the United Kingdom (*k*) or British India, is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England.

Comment.

No assignment of a bankrupt's property under the bankruptcy law of a foreign country, unless the bankruptcy takes place, as

(*g*) Not, however, in the case of Scotland, for 3 & 4 Geo. 5, c. 21, s. 97, distinguishes between the effect of bankruptcy on movable property wherever situate (sub-s. (1)) and real property, confining the trustee's right to real estate situate in the British dominions.

(*h*) See p. 364, *ante*. Compare *Jeffery v. McTaggart* (1817), 6 M. & S. 126.

(*i*) The word "bankruptcy," as applied to a foreign country, is here used in its very widest sense, and includes any proceeding, whatever its name, by which, under the authority of a Court, the property of an insolvent debtor is distributed among his creditors; a bankruptcy in this wide sense is sometimes described as any "process of divestiture and concurrence of creditors." See Goudy, *Law of Bankruptcy in Scotland* (4th ed.), p. 598.

(*k*) For definition of "United Kingdom," see p. 68, *ante*.

does a Scottish or Irish bankruptcy or Indian insolvency, under an Act of the Imperial Parliament, operates as an assignment of the bankrupt's immovables, *e.g.*, lands or houses in England, or, indeed, has any effect upon the title to them.

It may, indeed, be laid down in broad terms that, according to the doctrine maintained by English Courts, a bankruptcy in one country has no effect as an assignment or otherwise (except, of course, where the bankruptcy takes place under an Act of Parliament) on land in another country (*l*). But this statement is a little broader than the facts warrant. There is no reason to suppose that English Courts would decline to recognize the extra-territorial effect, as an assignment, of a bankruptcy in one country, *e.g.*, Victoria, on land of the bankrupt in another country, *e.g.*, New Zealand, which was given to a Victorian bankruptcy by the *lex situs*, *i.e.*, by an Act of the New Zealand legislature.

RULE 124 (*m*).—An assignment of a bankrupt's property to the representative of his creditors under the

(*l*) See *Cockerell v. Dickens* (1840), 3 Moore, P. C. 98 (decided before the Indian Insolvency Act, 1848). In *Waite v. Bingley* (1882), 21 Ch. D. 674, a Victorian insolvency was held not to affect the title to English land; a Victorian Act could give authority to require the insolvent to convey his land out of the colony for the benefit of his creditors, but no steps had been taken to make the insolvent do so during his life. Compare Rule 81, p. 364, *ante*; and compare *Araya v. Coghill*, (1921) 1 Sc. L. T. 321, which discusses, without deciding, the effect of a foreign bankruptcy on Scottish land. Note, however, that it is provided by the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 122, that the bankruptcy Courts throughout the British dominions are to act in aid of and be auxiliary to each other in all matters of bankruptcy, but this enactment is clearly insufficient to require the Courts in the United Kingdom to give effect to Acts passed in British possessions purporting to vest real estate beyond the limits of these possessions in the trustees in colonial bankruptcies, for enactments of this character are *ultra vires* colonial legislatures. See *Macleod v. Attorney-General for New South Wales*, [1891] A. C. 455; Keith, Responsible Government in the Dominions, i. 372—431. For the scope of s. 122, see *Re Levy's Trusts* (1885), 30 Ch. D. 119, 123—125, from which it appears that on an appropriate application by a colonial trustee the Court would give effect to the provisions of a colonial law vesting English land in a colonial trustee. In effect, therefore, a colonial bankruptcy approximates in its effect on land to an English bankruptcy. So, also, in Ireland under 35 & 36 Vict. c. 58, s. 71. In *re Bolton*, [1920] 2 Ir. R. 324.

(*m*) See *Solomons v. Ross* (1764), 1 H. Bl. 131 (n.); *Jollet v. Deponthieu* (1769), 1 H. Bl. 132 (n.); *Alivon v. Furnival* (1834), 1 Cr. M. & R. 277; *In re Davidson's Trusts* (1873), L. R. 15 Eq. 383; *In re Lawson's Trusts*, [1896] 1 Ch. 175; *In re Anderson*, [1911] 1 K. B. 896; *In re Craig*, [1916] W. N. 123; 86 L. J. Ch. 63. Compare the analogous case of sequestration of the property of the widow of a German subject domiciled in France, *Le Page v. San Paulo Coffee Estates Co., Ltd.*, [1917] W. N. 216; 33 T. L. R. 457.

bankruptcy law of any foreign country, whether the bankrupt is domiciled there or not, is or operates as an assignment of the movables of the bankrupt situate in England.

Comment.

The general principle of English law seems to be that bankruptcy, or any proceeding in the nature of bankruptcy, in a foreign country where the bankrupt is domiciled, is an assignment to the trustee, assignees, curators, syndics, or others, who under the law of that country are entitled to administer his property, of all his movables, or, in other words, his chattels personal and choses in action in England, and, it would seem, as far as English Courts can deal with the matter, of his movables situate in any other country (*n*).

This Rule, however, has not been established without a considerable conflict of judicial opinion, it having been suggested in one case (*o*), and decided in others (*p*), that the Rule was applicable only to the case of a bankruptcy in the country of the bankrupt's domicile. This distinction, however, was obviously out of harmony with the practice of the English Bankruptcy Court whose jurisdiction to adjudicate a debtor a bankrupt was not confined to persons domiciled in England (*q*), and there is now a clear balance of judicial opinion in favour of the Rule as stated above (*r*).

The effect in England of the assignment of a debtor's property under the bankruptcy law of a foreign country is subject to certain limitations:—

First. The assignment, of course, only takes place if under the law of the foreign bankruptcy provision is made for the extra-territorial effect of the bankruptcy. Moreover, the assignment

(*n*) See, especially, Westlake, s. 134, p. 178. As regards colonial bankruptcies, see also the Bankruptcy Act, 1914, s. 122; *In re Firbank, Ex parte Knight* (1887), 4 Mor. 50.

(*o*) *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640, which, however, is not a decision on this point.

(*p*) *In re Blithman* (1858), L. R. 2 Eq. 23; followed *In re Hayward*, [1897] 1 Ch. 905. Neither case is conclusive. See *In re Anderson*, [1911] 1 K. B. 896, 901, per Phillimore, J.; *In re Craig* (1917), 86 L. J. Ch. 63, per Eve, J.; *In re Burke, King v. Terry* (1919), 54 L. J. 430.

(*q*) See Rule 81, p. 364, *ante*.

(*r*) It is assumed that the foreign Court in adjudicating a debtor bankrupt does not extend its jurisdiction to cases beyond those recognized as being within the sphere of jurisdiction in bankruptcy of the English Court.

will only apply in England to such movable property as, had it been situate in the foreign country, would have passed to the representative of the creditors to be administered for their benefit.

Second. The property in England passes subject to any existing charges upon it recognized by the law of England, even if these charges would be postponed under the law of the place of bankruptcy to the claim of the creditors, and even if under an English bankruptcy the charges would be defeated by the title of the trustee in bankruptcy (*s*).

Third. Whether property is movable or immovable falls to be determined wholly by English law. Thus heirlooms, title deeds and other things held by English law to be immovables would not, if situate in England, pass under their owner's bankruptcy in New York to the American assignee (*t*).

Fourth. The fact that a foreign bankruptcy acts as an assignment of movables of the debtor situate in England does not affect in any way the right of the English Courts to adjudicate bankrupt any debtors falling within the terms of the Bankruptcy Act, 1914, and these Courts will exercise the right at their discretion as may seem most advisable in the interest of the collection of the bankrupt's estate for the benefit of his creditors (*u*).

Illustrations.

1. A debtor domiciled at Amsterdam stopped payment there on December 18, 1759. On January 2, 1760, he was declared bankrupt by the proper Court there, and a curator or assignee of his property was appointed. On December 20, 1759, *X*, a creditor of the bankrupt, made affidavit in the Mayor's Court at London, and attached 1,200*l.* in the hands of *M*, a debtor of the bankrupt. On March 8, 1760, *X* obtained judgment against *M*, and issued execution against *M*, who, being unable to pay, gave a note for 1,200*l.* payable in a month. On March 12, *A*, the Dutch

(*s*) Compare *Galbraith v. Grimshaw*, [1910] 1 K. B. (C. A.) 339; affirmed, [1910] A. C. 508, which refers to a Scottish bankruptcy, and applies *à fortiori* to a foreign bankruptcy; and *Goetze v. Aders* (1874), 2 R. 150.

(*t*) See chap. xxii., Rule 149, p. 539, *post*; *Waite v. Bingley* (1882), 21 Ch. D. 674.

(*u*) See *In re Artola Hermanos* (1890), 24 Q. B. D. (C. A.) 640, 643, 644, judgment of Coleridge, C. J.; *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716; *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816.

assignee, claimed the 1,200*l*. It was held that the title of *A* as assignee was superior to that of *X*, the attaching creditor (*x*).

2. *A* debtor executes under the law of Maryland a deed of assignment to trustees for the benefit of his creditors, and the trustees obtain from the appropriate Court authority to administer the trust under its control. *X*, to whom the debtor owes money, obtains judgment against him in England and proceeds to levy execution. The trustees have a superior title to the property of the debtor (*y*).

3. *N*, while resident, but not domiciled in New Zealand, is made bankrupt, and in due course receives his discharge. Later in England he is again made bankrupt, and it appears that he has a reversionary interest in a trust fund, which is situate in England and which he omitted to disclose to *A*, the trustee in his New Zealand bankruptcy. *X*, the trustee in the English bankruptcy, gives notice of a claim to the interest to the trustee of the fund. *A* has a superior claim to the bankrupt's interest in the fund (*z*).

English and Foreign Bankruptcy.

RULE 125 (*a*).—Where a debtor has been made bankrupt in more countries than one, and, under the bankruptcy law of each of such countries, there has been an assignment of the bankrupt's property, which might, under any of the foregoing Rules (*b*), operate as an assignment of his property in England, effect will be given in England to that assignment which is earliest in date.

(*x*) *Solomons v. Ross* (1764), 1 H. Bl. 131 (n.). The case was decided without reference to domicile. See *Loughborough, L.*, in *Folliott v. Ogden*, 1 H. Bl. 132. The claim of the attaching creditor would (*semble*) now be preferred. See *Galbraith v. Grimshaw*, [1910] A. C. 508, 511, per Lord Loreburn.

(*y*) *Dulaney v. Merry & Son*, [1901] 1 K. B. 536.

(*z*) See *In re Anderson*, [1911] 1 K. B. 896.

(*a*) *Geddes v. Mowat* (1824), 1 Gl. & J. 414; *In re O'Reardon* (1873), L. R. 9 Ch. 74. Compare *Ex parte McCulloch* (1880), 14 Ch. D. (C. A.) 716; and *Ex parte Robinson* (1883), 22 Ch. D. (C. A.) 816. See the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 12, as to power of Court to deal with case where receiving order has been made by Court against debtor whose estate ought to be distributed under Irish or Scottish bankruptcy law. See *Baldwin* (11th ed.), p. 185; Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. 5, c. 20), s. 43.

(*b*) See Rule 80, p. 362, *ante*; Rules 122—124, *ante*.

Comment.

First. This Rule holds good when the earliest of several bankruptcies takes place within the United Kingdom.

On the 1st of January a debtor is adjudicated bankrupt in Ireland, and his property thereupon passes, or is assigned, to the Irish assignees, and this whether his property is situate in Ireland or in England. On the 2nd of January he is adjudicated bankrupt in England, and his property (if any) passes or is assigned to the English trustee, but it is in reality the assignment under the Irish bankruptcy which operates in England; for by the 2nd of January the immovables or movables, which were the property of the bankrupt on the 31st of December, have on the 1st of January ceased to belong to him, and been vested in the Irish assignees. These immovables or movables, therefore, cannot on the 2nd of January pass to the English trustee as property of the bankrupt (*c*).

Secondly. The Rule probably holds good where the earliest of several bankruptcies, and the assignment under it, takes place in a country beyond the limits of the United Kingdom, *e.g.*, Victoria (*d*) or Prussia.

II. AS A DISCHARGE (*e*).

RULE 126 (*f*).—A discharge from any debt or liability under the bankruptcy law of the country where the debt

(*c*) Priority, for the purpose of this Rule, depends on the date of the assignment, and not on the date of the commission of the act of bankruptcy. See *Geddes v. Mowat* (1824), 1 Gl. & J. 414. It should be noted that, as regards a Scottish bankruptcy, though it is the act and warrant of confirmation which vests the bankrupt's property in the trustee, it is then vested as at the date of the sequestration. See 3 & 4 Geo. 5, c. 20, ss. 97 and 41. In considering, therefore, whether an assignment under an English bankruptcy or an assignment under a Scottish bankruptcy is the earlier, the date to be looked at is the date of the adjudication (see the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 53) in the one case and of the sequestration in the other.

(*d*) See *In re Anderson*, [1911] 1 K. B. 898. In *In re Macfadyen & Co.*, [1908] 1 K. B. 675, where a bankruptcy in England and one in India under an Imperial statute (11 & 12 Vict. c. 21) were almost contemporaneous, arrangements were approved by the Court for the co-operation of the trustees in the two bankruptcies.

(*e*) Story, ss. 331—340; Westlake, ss. 240—242 (*a*); Foote, pp. 434, 435. See Rule 81, p. 364, *ante*.

(*f*) *Potter v. Brown* (1804), 5 East, 124; *Gardiner v. Houghton* (1862), 2 B. & S. 743; *Quelin v. Moisson* (1827), 1 Knapp, P. C. 265 (*n.*); *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, judgment of Bovill, C. J.; *Bartley*

or liability has been contracted or has arisen [or perhaps where it is to be paid or satisfied ?] is a discharge therefrom in England (*g*).

Comment.

This Rule is well established, but there is some little doubt as to its exact extent.

The discharge of a debt (including in that term any obligation to pay money arising from a contract) under the bankruptcy law of the country where the debt is incurred (*lex loci contractus*) is a valid discharge in England.

"The rule," says Lord Ellenborough, "was well laid down by Lord Mansfield, in *Ballantine v. Golding*, that what is a discharge of a debt in the country where it was contracted is a discharge of it everywhere" (*h*).

"The rule adopted," says Cockburn, C. J., "by Lord Ellenborough, in *Potter v. Brown* (*h*), after the case of *Ballantine v. Golding* (*i*) and *Hunter v. Potts* (*k*), . . . applies to a discharge by a Court in a foreign country; *à fortiori*, it applies to a discharge by a Court in one of the British colonies" (*l*).

"There is no doubt," it has been laid down (*m*), "that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability, and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country. This is the law of England, and is a principle of private international law adopted in other countries. It was laid down by Lord King, in *Burrows v. Jemino* (*n*); by Lord Mansfield, in *Ballantine v. Golding* (*o*); by Lord Ellenborough,

v. Hodges (1861), 1 B. & S. 375; 30 L. J. Q. B. 352; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28; *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399.

(*g*) As all the Rules in this Digest are rules of English law, the words "in England" are not strictly necessary, but are here inserted to prevent misunderstanding.

(*h*) *Potter v. Brown* (1804), 5 East, 124, 130; 7 R. R. 663, 667, judgment of Ellenborough, C. J.

(*i*) (1783), Cooke, Bk. Law (8th ed.), 487.

(*k*) (1791), 4 T. R. 182.

(*l*) *Gardiner v. Houghton* (1862), 2 B. & S. 743, 748, per Cockburn, C. J.

(*m*) *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, judgment of Court delivered by Bovill, C. J.

(*n*) (1726), 2 Stra. 733.

(*o*) (1783), Cooke, Bk. Law, 487.

"in *Potter v. Brown* (*p*); by the Privy Council, in *Odwin v. Forbes* (*q*); and in *Quelin v. Moisson* (*r*); and by the Court of Queen's Bench in the case of *Gardiner v. Houghton* (*s*); and by the Court of Exchequer Chamber, in the elaborate judgment "delivered by my brother Willes, in *Phillips v. Eyre*" (*t*).

This principle certainly applies to a debt payable in the country where it is incurred, and probably applies to a debt incurred in one country, *e.g.*, Victoria, and payable in another, *e.g.*, England (*u*).

The discharge of a debt under the bankruptcy law of the country where it is made payable (*lex loci solutionis*) is possibly a valid discharge in England, but this is not certain (*x*).

The discharge from any liability which does not arise from a contract, *e.g.*, liability to pay damages for a tort, under the bankruptcy law of the country where the liability has arisen (*lex loci delicti commissi*) is a valid discharge in England (*y*).

A discharge, be it noted, cannot have a greater extra-territorial effect than it has under the law of the country where it is obtained. A bankruptcy, *e.g.*, in Victoria, will in no case free a debtor in England from any liability from which he is not discharged under the Victorian bankruptcy law; nor, conversely, will an English bankruptcy free him in Victoria from any debt from which he is not discharged under the English Bankruptcy Act (*z*).

A discharge, again, under the law of a foreign country, will not operate in England unless it is an extinction of the debt or liability; if, in the country where it is obtained, it interferes merely with the remedies or the procedure for enforcing the bankrupt's liabilities, it will not be a discharge in England (*a*).

(*p*) (1804), 5 East, 124.

(*q*) (1817), Buck. 57.

(*r*) (1827), 1 Knapp, 265, 266, n.

(*s*) (1862), 2 B. & S. 743.

(*t*) (1870), L. R. 6 Q. B. 1, 28.

(*u*) Compare, however, *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 405, judgment of Esher, M. R.

(*x*) Compare *Gardiner v. Houghton* (1862), 2 B. & S. 743, 745, language of Blackburn, J., and *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, judgment of Bovill, C. J., with *Potter v. Brown* (1804), 5 East, 124, 130, judgment of Ellenborough, C. J., and *Gardiner v. Houghton*, 2 B. & S. 743, 748, judgment of Cockburn, O. J.

(*y*) See *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 28, compared with *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, and Westlake, s. 242.

(*z*) For such debts, see Bankruptcy Act, 1914, s. 30.

(*a*) See *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 238; and Story, s. 338.

Illustrations.

1. X incurs a debt to A in Victoria for goods there sold and delivered by A to X. Afterwards X obtains a discharge under the Victorian insolvency law. The discharge is an answer to an action for the debt in England (b).

2. A bill is drawn in one of the United States by X in favour of A on a person in England. It is dishonoured by non-acceptance. The drawer is discharged in America under the bankruptcy law there in force. The discharge is valid in England (c).

3. X enters in England into a contract with A to pay him 100*l*. The debt is made payable in Victoria and not elsewhere. X is made bankrupt in Victoria and obtains a discharge from the debt. The discharge (*semble*) is valid in England (d).

RULE 127(e).—Subject to Rule 128, the discharge from any debt or liability under the bankruptcy law of a foreign country where such debt or liability has neither—

(1) been contracted or has arisen, nor

(2) is to be paid or satisfied,

is not a discharge therefrom in England.

Comment.

“As a general proposition, it is . . . true that the discharge “of a debt or liability, by the law of a country other than that in

(b) *Gardiner v. Houghton* (1862), 2 B. & S. 743; *Quelin v. Moisson* (1827), 1 Knapp, P. C. 265 (n.); *Smith v. Buchanan* (1800), 1 East, 6; *Potter v. Brown* (1804), 5 East, 124.

(c) *Potter v. Brown* (1804), 5 East, 124. Compare *Symons v. May* (1851), 6 Ex. 707; 20 L. J. Ex. 414.

(d) See note (f), p. 477, *ante*.

(e) *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234; *Smith v. Buchanan* (1800), 1 East, 6; *Lewis v. Owen* (1821), 4 B. & Ald. 654; *Phillips v. Allan* (1828), 8 B. & C. 477; *Bartley v. Hodges* (1861), 1 B. & S. 375; 30 L. J. Q. B. 352.

A “release in the foreign country could not *per se* get rid of a cause of action arising out of a contract to be performed in this country.” *Taylor v. Hollard*, [1902] 1 K. B. 676, 682, judgment of Jelf, J., citing Rule 127 with approval. The language of Jelf, J., goes a little beyond the rule, but the cause of action or liability in the particular case both arose and was to be satisfied in England.

“which the debt arises, does not relieve the debtor in any other country” (f).

“The general rule,” says Lord Esher, “as to the law which governs a contract, is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract, not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. . . . The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought. That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled, the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound;

(f) *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, judgment of Bovill, C. J. Compare *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 406, judgment of Esher, M. R.; *In re Nelson, Ex parte Dare and Dolphin*, [1918] 1 K. B. (C. A.) 456, which shows that a composition with creditors under the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), ss. 343—347, does not operate against creditors in England in respect of debts incurred there.

"it is the law of another country, by which they have not agreed "to be bound" (*g*).

The effect, then, of Rules 126, 127, is, that the validity in England of the discharge from a contract under the bankruptcy law of a foreign country depends (in so far as the case does not fall within Rule 128), as does the validity of every other discharge, on its being a discharge under the proper law of the contract (*h*). But it should be borne in mind that, in determining the extra-territorial effect of a discharge in bankruptcy, the Courts appear to be specially ready to assume that the law of a country where a contract is made (*lex loci contractus*) is the proper law of the contract, and very probably hold that a discharge under the bankruptcy law of the country where a contract is made is valid everywhere, even though the contract be performable in another country (*i*).

Illustrations.

1. *X*, a Frenchman domiciled in France, makes a contract with *A*, an Englishman, for the purchase of copper. The copper is, under the contract, to be delivered by *A* to *X* at Liverpool, and *X* is to pay for it in London. The contract, moreover, is made subject to the rules of the London Metal Exchange. *X* makes default in accepting the copper, and afterwards obtains in France from a French Court a discharge in bankruptcy or liquidation. Such a discharge frees *X* under French law from liability for the breach of the contract. *A* brings an action against *X* in England for breach of contract. The discharge under the French bankruptcy is not an answer to the action, *i.e.*, it is not a valid discharge (*k*).

2. *A* draws, and *X* accepts, a bill in England, and *X* also borrows money from and states accounts with *A* in England. *X* after this becomes bankrupt in Victoria, and obtains his discharge under the Victorian bankruptcy laws. *A* brings an action in England against *X* on the bill for money lent and on the accounts stated.

(*g*) *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 405, 406, judgment of Esher, M. R.

(*h*) As to meaning of "proper law of the contract," see Rule 155, p. 572, *post*; as to discharge, see Rule 162, p. 615, *post*.

(*i*) The bankrupt's domicile has no bearing on the extra-territorial effect of a discharge. See *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, compared with *Gardiner v. Houghton* (1862), 2 B. & S. 743. Cf. p. 474.

(*k*) *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399.

The discharge in Victoria is not a defence to the action, *i.e.*, it is not a valid discharge (*l*).

RULE 128 (*m*).—A discharge from any debt or liability under a Bankruptcy Act of the Imperial Parliament, and hence under—

- (1) an English bankruptcy (*n*),
- (2) an Irish bankruptcy (*o*),
- (3) a Scottish bankruptcy (*p*),
- (4) in certain circumstances, under an Indian bankruptcy (*q*),

is, in any country forming part of the British dominions, a discharge from such debt or liability, wherever, or under whatever law, the same has been contracted or has arisen.

Comment.

An Act of the Imperial Parliament discharging a debtor from a debt takes effect throughout the whole of the Crown's dominions, and a discharge under such an Act is valid in every part of the British Empire, and this irrespective of the question where it is that the debt or other liability has arisen, or what may be the proper law of the contract under which it has been incurred (*r*).

(*l*) *Bartley v. Hodges* (1861), 1 B. & S. 375.

(*m*) Westlake, ss. 241—242, a; Foote, p. 434; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228; *Gill v. Barron* (1868), L. R. 2 P. C. 157, 175, 176; *Ferguson v. Spencer* (1840), 2 Scott, N. R. 229; 1 M. & G. 987; *Edwards v. Ronald* (1830), 1 Knapp, 259; *Sidaway v. Hay* (1824), 3 B. & C. 12; *Philpotts v. Reed* (1819), 1 Br. & Bing. 294. This case is specially instructive, as the discharge, though directly under an Imperial Act of Parliament, was a colonial discharge. But Rule 128 does not apply to a discharge under a winding-up order within the Companies (Consolidation) Act, 1908. See Rule 83, p. 371, *ante*.

(*n*) *I.e.*, under the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59). See Rule 82, p. 371, *ante*.

(*o*) *I.e.*, under the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60). See also 35 & 36 Vict. c. 58.

(*p*) *I.e.*, under the Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. 5, c. 20). See especially, sects. 137, 143, 144.

(*q*) *I.e.*, under the Indian Insolvency Act, 1848 (11 & 12 Vict. c. 21), s. 60, the effect of which is limited to the United Kingdom, and is conditional on due notice being given of the Indian proceedings.

(*r*) *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234—236; *Sidaway v. Hay* (1824), 3 B. & C. 12; *Ferguson v. Spencer* (1840), 1 M. & G. 987; *Simpson v. Mirabita* (1869), L. R. 4 Q. B. 257.

A discharge, therefore, under the English Bankruptcy Act, 1914, is a valid discharge, *e.g.*, in Scotland or in Victoria, of debts or liabilities incurred, whether in Scotland, or in Victoria, or elsewhere; whilst a discharge under the Scottish Bankruptcy Act (*s*), or under the Irish Bankruptcy Act, is a valid discharge, *e.g.*, in England or in Victoria, of debts or liabilities wherever incurred.

"An adjudication in bankruptcy, followed by a certificate or "discharge in this country under the bankrupt laws passed by the "Imperial Legislature, has the effect of barring any debt which "the bankrupt may have contracted in any part of the world, and "it would have the effect of putting an end to any claims in the "island of Barbadoes, or elsewhere, to which the [bankrupt] "might have been liable at the date of the adjudication" (*t*).

Rule 128, combined with Rule 127, leads to the result that a discharge under an English Bankruptcy Act is, in Victoria, a discharge from a debt contracted in Victoria or elsewhere, whilst a discharge under a Victorian Bankruptcy Act is not in England a discharge from a debt or liability not arising in Victoria (*u*).

Question 1.—Is the discharge under the bankruptcy law of a foreign country impeachable in England on the ground that the Courts of the foreign country had no jurisdiction to make the debtor a bankrupt?

The reply must, it is submitted, be in the negative.

If the bankruptcy takes place in Ireland or Scotland, it is extremely doubtful whether an English Court can question the jurisdiction of the Irish or Scottish Bankruptcy Court (*x*).

If the bankruptcy takes place in a country outside the United Kingdom, *e.g.*, in Victoria or New York, then, if the discharge

(*s*) The Scottish Bankruptcy Act, 1913, ss. 137, 144, specially provides that a discharge under the Act shall have effect throughout the dominions of the Crown. The English and Irish Bankruptcy Acts do not contain a similar provision, but the effect of a discharge under either of them is none the less extensive. A composition with creditors under the Irish Act, ss. 343—347, has no such effect. *In re Nelson, Ex parte Dare and Dolphin*, [1918] 1 K. B. (C. A.) 456.

(*t*) *Gill v. Barron* (1868), L. R. 2 P. C. 157, 175, 176, *per Curiam*. See *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, 235.

(*u*) See for explanation of doctrine on which Rules 126 and 127 (pp. 477, 480, *ante*) are based, App., Note 18, "Theoretical Basis of the Rules as to the extra-territorial effect of a Discharge in Bankruptcy."

(*x*) Compare *Craster v. Thomas*, [1909] 2 Ch. 348; and see p. 368, *ante*, as to the analogous question, whether any Court in the British dominions can question the jurisdiction of an English Bankruptcy Court.

operates in England at all, the debtor has as a fact been relieved from liability to pay his debt under the proper law of the contract, *i.e.*, speaking generally, under the law of the country where the contract was made, and, this being so, the discharge ought to be operative in England independently of the jurisdiction of the foreign Court to make the debtor a bankrupt.

Question 2.—Can a discharge under the bankruptcy law of a foreign country be impeached in England for fraud?

The answer apparently is that it can. The grounds on which a foreign judgment, even when given by a Court of competent jurisdiction, is impeachable for fraud (*y*) seem equally applicable to a discharge in bankruptcy.

(B) FOREIGN GRANT OF ADMINISTRATION.

RULE 129(*z*).—A grant of administration or other authority to represent a deceased person under the law of a foreign country has no operation in England.

This Rule must be read subject to the effect of Rules 133 to 135.

Comment.

A foreign representative of the deceased who wishes to represent him in England must obtain a grant of administration here, and cannot in general be sued here in his character of foreign personal representative (*a*). Our Rule is, in short, an application of the general principle that no person will be recognized by English Courts as personal representative of the deceased unless and until he has obtained an English grant of probate or letters of administration (*b*).

(*y*) See pp. 433—439, *ante*.

(*z*) See Story, s. 513; Foote (4th ed.), pp. 271, 272; Williams, Executors (11th ed.), pp. 263, 264; *Carter and Crost's Case* (1585), Godb. 33; *Tourton v. Flower* (1735), 3 P. Will. 368, 370; *Bond v. Graham* (1842), 1 Hare, 482; *New York Breweries Co., Ltd. v. Att.-Gen.*, [1899] A. C. 62.

(*a*) As to this, see Rule 132, p. 493, *post*.

(*b*) See as to executor *de son tort*, Walker & Williams, chap. xxviii.; *New York Breweries Co., Ltd. v. Att.-Gen.*, [1899] A. C. 62. Note especially that an executor derives an inchoate right from the will, and in some respects can rightfully act as personal representative, *e.g.*, commence an action, before he has obtained probate. See also *Rogers v. Frank* (1827), 1 Y. & J. 409, 414, judgment of Alexander, C. B., and Rule 75, p. 335, *ante*.

Illustrations.

1. An Englishman dies intestate domiciled in New York, leaving goods there. *A* takes out administration in New York. *X*, in England, owes a debt to the deceased. *A* cannot bring an action in England against *X* until he has obtained an English grant of administration (*c*).

2. An Englishman dies in 1846 at Geneva, where his will is proved. *A* is *X*'s personal representative under the law of Geneva. A sum of 34*l.* is due to the deceased, and has been paid into Court. *A* has not taken out probate in England. He applies for payment of the 34*l.* Payment is refused (*d*).

RULE 130(*e*).—Where a person dies domiciled in a foreign country, leaving movables in England, the Court will (in general) make a grant (*f*) to his personal representative under the law of such foreign country.

Comment.

A foreign personal representative has, as such, no authority in England; but our Courts recognize the primary, though certainly not the exclusive (*g*), jurisdiction of the Courts of a deceased person's domicile to administer his movable property, and to determine who is the person entitled to deal with such property (*h*). When, therefore, any person, under whatever name, is appointed by the Courts of the domicile to represent the deceased, such repre-

(*c*) *Carter and Crost's Case* (1585), Godb. 33; *Tourton v. Flower* (1735), 3 P. Will. 368.

(*d*) *Lasseur v. Tyrconnel* (1846), 10 Beav. 28.

(*e*) 1 Williams, Executors (11th ed.), pp. 338, 339; Walker & Williams, pp. 41, 42; Westlake (5th ed.), ss. 63—69; Foote, pp. 266, 267; *Re Bianchi* (1859), 1 Sw. & Tr. 511; *In Goods of Earl* (1867), L. R. 1 P. & D. 450; *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24; *In Goods of Smith* (1868), 16 W. R. 1130; *In Goods of Hill* (1870), L. R. 2 P. & D. 89; *In Goods of Prince Oldenburg* (1884), 9 P. D. 234; *In Goods of Dost Aly Khan* (1880), 6 P. D. 6. Conf. *In Goods of Whitelegg*, [1899] P. 267.

(*f*) See, for meaning of "grant," Rule 75, p. 335, *ante*.

(*g*) See *Enohin v. Wylie* (1862), 10 H. L. C. 1; and contrast pp. 13—16, language of Westbury, C., with p. 19, language of Lord Cranworth; and pp. 23, 24, language of Lord Chelmsford; *In re Trufort* (1887), 36 Ch. D. 600, 611, judgment of Stirling, J.; *In re Bonnefoi, Surrey v. Perrin*, [1912] P. (C. A.) 233, 236—239, judgment of Cozens-Hardy, M. R.

(*h*) *Ibid.*; and compare *In Goods of Briesemann*, [1894] P. 260; *In Goods of Earl* (1867), L. R. 1 P. & D. 450; *In Goods of Lemme*, [1892] P. 89; *In Goods of Von Linden*, [1896] P. 148; *In Goods of Moffatt*, [1900] P. 152.

sentative has, as a rule, a claim (*i*), though not an absolute right, to an English grant, and such grant will usually be made to him by the Court, which will moreover, in general, follow the foreign grant so as to give the foreign personal representative no more than such powers as are required for the performance by him in England of the duties imposed upon him under the law of the deceased person's domicile (*k*).

It may happen that under the law of the foreign domicile no person is appointed by any Court to represent the deceased. In this case that person will be treated as his representative who has, under the law of the foreign country, a right, *e.g.*, as heir or universal successor, to deal with the property of the deceased (*l*).

The Court, however, may in its discretion decline to grant administration to the foreign personal representative of the deceased if there be any reason for the refusal.

"The result of the cases is, that in the Prerogative Court the tendency was to follow the foreign grant where it could be done, "but there was a reluctance to lay down any absolute rule in the matter, whilst the decisions in the Court of Probate (as *In the Goods of H. R. H. the Duchess d'Orléans*) (*m*) have militated against the rule of following the foreign grant" (*n*), and the Court, whilst in general granting administration to a foreign representative appointed by the Court of the deceased's domicile, will constantly vary the form of the grant if a variation is needed by the requirements of English law (*o*).

(*i*) *In Goods of Earl* (1867), L. R. 1 P. & D. 450; *In Goods of Hill* (1870), L. R. 2 P. & D. 89.

(*k*) *In Goods of Earl* (1867), L. R. 1 P. & D. 450, 453, judgment of Sir J. P. Wilde; *In Goods of Smith* (1868), 16 W. R. 1130; *In Goods of Briesemann*, [1894] P. 260, 261; *Re Steigerwald* (1864), 10 Jur. (N. S.) 159; *Viesca v. d'Aramburu* (1839), 2 Cur. 277; *In Estate of Groos*, [1904] P. 269.

(*l*) *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24; *Re Oliphant* (1860), 30 L. J. P. & M. 82; *Re Stewart* (1838), 1 Cur. 904; even a creditor, *In Goods of Marver* (1828), 1 Hagg. Ecc. 498.

(*m*) (1850), 1 Sw. & Tr. 253; 28 L. J. P. & M. 129.

(*n*) *In Goods of Earl* (1867), L. R. 1 P. & D. 450, 452, judgment of Sir J. P. Wilde. Compare *In Goods of Weaver* (1866), 36 L. J. P. & M. 41.

In time of war, in the case of alien enemies domiciled in an enemy country, a grant may appropriately be made to the Public Trustee. *In Estate of Grundt*, [1915] P. 126. Compare *In Estate of Schiff*, [1915] P. 86.

(*o*) See *In Goods of Cosnahan* (1866), L. R. 1 P. & D. 183; *In Goods of Earl* (1867), L. R. 1 P. & D. 450. Under 24 & 25 Vict. c. 121, s. 4, treaty arrangements may be made with any foreign State so that the consul of such State may, in the absence of any person entitled to administration, be able to administer the personal property of subjects thereof dying in His Majesty's dominions. See also *In Goods of Migazzo* (1894), 70 L. T. 246.

The Court will generally, in cases falling within Rule 130, make a grant to the personal representative of the deceased. But the reason for making this grant to such personal representative is the fairness and expediency of allowing him to deal with all the movable property of the deceased, the beneficial succession to which is governed by the law of the deceased's foreign domicile. This reason does not apply to English immovables, the beneficial succession to which is governed by the law of England. There is, therefore (it is submitted), a possibility that the Land Transfer Act, 1897, which for the first time vests the English real estate of a deceased person in his personal representative, may, under some circumstances, afford good ground for not making a grant to the representative of a deceased person who has died domiciled in a foreign country.

Illustrations.

1. *T* dies domiciled in the Mauritius, leaving a will and codicil signed but not witnessed. Probate is granted in the Mauritius to *A*. The Court makes a grant to *A* (*p*).

2. *N* dies domiciled in Brazil intestate. *P* is appointed by a Brazilian Court guardian of *N*'s children. *P* appoints *Q*, the Brazilian Minister at Turin, his attorney in the matter, with power of substitution, and issues letters of request to judicial authorities in England to deliver property of deceased to *Q* or his representative. *Q* appoints *A*, resident in England, his substitute. The Court makes a grant to *A* (*q*).

3. *T*, an Englishman, dies domiciled in France. He appoints under his will an *exécuteur testamentaire*. It is determined by a French Court that the time limited by French law for the execution of such executorship has passed; that such executor has no longer a right to intermeddle in *T*'s estate; and that *A* and *B*, the parties beneficially entitled, are the only persons who have a right to intermeddle. The executor applies for an English grant. The Court refuses to make a grant to the executor, and grants administration to *A* and *B* (*r*).

4. *T* is a British subject who dies domiciled in France. At the time of his death he possesses in France both movables and immovables. He possesses in England 500*l.*, lying at a bank, and

(*p*) *In Goods of Smith* (1850), 2 Rob. Ecc. Rep. 332. See *In Goods of Mackenzie* (1856), Deane & Sw. 17.

(*q*) *Re Bianchi* (1859), 1 Sw. & Tr. 511.

(*r*) *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24.

real property of great value. He has executed a will leaving the whole of his property to a stranger, *A*. The will is in a form which is valid by the law of France, but, being unattested, is, though valid as to the 500*l.* lying in the English bank, invalid as to *T*'s real property in England (*s*). The Court would (*semble*) make a grant to *T*'s heir, and not to *A*.

5. *T* dies domiciled in France. *A*, a French citizen, also domiciled in France, is under French law entitled to represent *T*, and to the possession of *T*'s property. *A* is, according to English law, a minor. *A* applies for a grant of administration, with the will annexed, of the goods of *T* in England. The grant is refused, on the ground that in England a grant cannot be made to a minor (*t*).

RULE 131 (*u*).—A foreign personal representative has (*semble*) a good title in England to any movables of the deceased which—

- (1) if they are movables which can be touched, *i.e.*, goods, he has in any foreign country acquired a good title to under the *lex situs* (*x*) [and has reduced into possession (?)];
- (2) if they are movables which cannot be touched, *i.e.*, debts or other choses in action, he has in a foreign country acquired a good title to under the *lex situs*, and has reduced into possession (*y*).

Comment.

This Rule, and especially clause (1), rests on but slight authority. It is, however, supported by writers of weight, and is in

(*s*) See chap. xxx., Rule 195, and Exception 1, *post*.

(*t*) *In Goods of Duchess d'Orléans* (1859), 1 Sw. & Tr. 253; 28 L. J. P. & M. 129; *In Goods of Meatyard*, [1903] P. 125, 129.

(*u*) See chap. xxiv., Rule 152, p. 561, *post*, and cases cited in note thereto. Compare Westlake (5th ed.), s. 95, and Story, s. 516, with Foote, pp. 276, 277. And see *Currie v. Bircham* (1822), 1 D. & R. 35; *Jauncy v. Sealey* (1686), 1 Vern. 397; *Vanquelin v. Bouard* (1863), 15 C. B. (N. S.) 341; 33 L. J. C. P. 78; contrast *Whyte v. Rose* (1842), 3 Q. B. 493, 506. See Rule 86, p. 376, *ante*. With this Rule should be read Rule 132, p. 493, *post*.

(*x*) For meaning of *lex situs*, see pp. 69, 78, *ante*.

(*y*) *In re Macnicol* (1874), L. R. 19 Eq. 81.

the main a deduction from the principle contained in Rules 152 and 153 (z).

(1) *As to goods*.—"The corporeal chattels [goods] of a deceased person belong," writes Westlake, "to the heir or administrator who first reduces them into possession within the territory from the law or jurisdiction of which he derives his title or his grant" (a).

"If a foreign administrator," writes Story, "has, in virtue of his administration, reduced the personal property of the deceased there situated [*i.e.*, situated in a foreign country] into his own possession, so that he has acquired the legal title thereto according to the laws of that country; if that property should afterwards be found in another country, or be carried away and converted there against his will,—he may maintain a suit for it there in his own name and right personally, without taking out new letters of administration; for he is, to all intents and purposes, the legal owner thereof, although he is so in the character of trustee for other persons. . . . The plain reason . . . is, that the executor . . . [has] . . . in his own right become full and perfect legal [owner] of the property by the local law; and a title to personal property, duly acquired by the *lex loci rei sitæ*, will be deemed valid, and be respected as a lawful and perfect title in every other country" (b).

(z) See chap. xxiv., pp. 561, 565, *post*. Compare Rule 86, p. 376, *ante*.

(a) Westlake (5th ed.), s. 95. He supports his view on the following three dicta from *Whyte v. Rose* (1842), 3 Q. B. 493:—(i) "If property came to England after the death, would the foreign administration give a right to it?" *Ibid.*, p. 506, per Rolfe, B. (ii) "Suppose, after a man's death, his watch be brought to England by a third party, could such party, in answer to an action of trover by an English administrator, plead that the watch was in Ireland at the time of the death?" *Ibid.*, per Parke, B. (iii) "It seems to me that your argument goes too far, and would show that no administration in England could give a right over goods anywhere out of England. A man may sue here in his own right, naming himself as executor or administrator under a foreign probate or grant; but does a man ever sue here in the character of executor or administrator under such a probate or grant?" *Ibid.*, 504, 505, per Abinger, C. B. These dicta are extremely vague, and, even if they can be so interpreted as to support Westlake's view, they were delivered at a time when less deference was paid than at present to a title acquired under the *lex situs*. See, however, Story, s. 520, and the New York case, *Orcutt v. Orms*, 3 Paige, 459, 465, where it was suggested that if administration were granted in two States, the property in stage coaches running between them would belong to the administrator who first took possession.

(b) Story, s. 516. The words omitted refer to the analogous case of a legatee.

This reason, obviously the right one, forcibly suggests that our Rule should be more broadly stated, and that a foreign personal representative who has in a foreign country acquired a title to goods in accordance with the *lex situs* has the rights of an owner in England, even in the rare cases where he has acquired a *title* to without obtaining *possession* of the goods (*c*).

(2) *As to debts*.—The *situs* of a chose in action being always more or less of a fiction (*d*), a debt may well for our present purpose be considered situate at the place where it is reduced into possession, *e.g.*, by payment, or by the obtaining of judgment for it; whence it would naturally follow that the personal representative who has thus reduced it into possession has a title to it in England or elsewhere (*e*). The question, however, whether a debt has or has not been duly reduced into possession by a judgment depends on the answer to the inquiry whether the judgment has been given by a "Court of competent jurisdiction," in the sense in which that term is used in these Rules (*f*). If this question be answered in the negative, the judgment has no effect in England (*g*).

Question 1.—*What is the position of a foreign personal representative who receives payment of debts in England? (h).*

He is apparently in the position of an executor *de son tort*; he has no right to collect debts due to the deceased in England, he cannot (*semble*) retain the money paid him against an English administrator nor give a discharge for the debt.

Question 2.—*Is payment by a debtor to a foreign personal representative a discharge from the debt in England as against the English administrator? (i).*

(1) Such a payment, when made in England, can hardly (it would seem) be a discharge. The debtor is under no compulsion to pay the foreign administrator who cannot as such sue for the

(*c*) Compare Foote (4th ed.), p. 277. It should be noted that negotiable instruments payable to bearer are to be considered as goods, and come within clause (1) of our Rule. See Story, s. 517, and Westlake (5th ed.), s. 96.

(*d*) See pp. 342—345, *ante*; *Smelting Co. of Australia v. Commissioners of Inland Revenue*, [1897] 1 Q. B. (C. A.) 175.

(*e*) *In re Macnichel* (1874), L. R. 19 Eq. 81; *Vanquelin v. Bouard* (1863), 15 C. B. (N. S.) 341.

(*f*) See p. 386, *ante*.

(*g*) See Rule 104, p. 429, *ante*.

(*h*) Story, s. 514; Foote, pp. 278, 279.

(*i*) Compare Story, ss. 514—515 *a*, and especially, s. 515, note 3. See also Foote, pp. 279, 280.

debt, but the debtor from the mere fact of being in England is liable at any moment to be sued by the English administrator.

(2) The effect of such a payment when made in a foreign country would seem to depend mainly upon the *situs* of the debt (*k*), or in other words upon the place where the debt is most properly recoverable. If a debtor of a deceased person dying domiciled in New York, who is himself resident in New York, pays the debt to the New York administrator, such payment would, it is submitted, be a discharge from the debt in England as against any claim of the English administrator, and the same result would probably follow if the debtor making the payment is resident in New York, even though the deceased died domiciled in England. If, on the other hand, a debtor habitually resident in England, indebted to a deceased person dying domiciled in England, were in New York voluntarily to pay the debt to the New York administrator, the payment would not (*semble*) be a discharge as against the English administrator, and the same remark would perhaps hold good even though the deceased creditor died domiciled in New York (*l*).

Illustrations.

1. Deceased has died leaving goods in New York. *A* is his administrator under the law of New York. *A* takes possession as administrator of goods of the deceased. The goods are taken to England. *A* is the owner of the goods, and can bring an action in England against *X* who converts them.

2. Deceased has died leaving goods in New York. After *A* has taken out administration in New York, but before *A* has obtained possession of the goods, *X* takes them without *A*'s authority to England, where *B* has obtained a grant of administration as personal representative of the deceased. Whether *A* is in England owner of the goods, and whether he can bring there an action of trover against *X*? (*m*).

(*k*) Compare *Daniel v. Luker* (1571), Dyer, 305 *a*; *Whyte v. Rose* (1842), 3 Q. B. 493; *Huthwaite v. Phaire* (1840), 1 M. & G. 159. These cases, though not decisive, certainly suggest that the *situs* of the debt is the matter to be mainly considered.

(*l*) This point is very doubtful. Compare Story, s. 515, note 3. If the payment were made in New York under compulsion, *i.e.*, in consequence of an action, the effect of the payment as a discharge might perhaps depend on whether the debtor had or had not pleaded before the New York Court that the debt was due to the English administrator.

(*m*) See pp. 489—491, *ante*. Story, s. 520, holds that in the case of a ship and cargo *B* would have a good title.

3. Deceased has died intestate in India, where *A* takes out letters of administration. *A* sends proceeds of deceased's effects to *X*, her agent in England. *B*, the English administrator, cannot bring an action against *X* for the money of the intestate received by him, *i.e.*, it is money belonging to *A* (*n*).

4. *A*, the Indian administrator of *N*, obtains in India a judgment against *X* for 5,000*l.* due to *N*. *A* can bring an action against *X* in England in *A*'s own name without taking out a grant of administration in England, *i.e.*, the debt having been reduced into possession, *A* has a good title to it (*o*).

RULE 132(*p*).—A foreign personal representative is not, as such, under any liability in England, and cannot, as foreign personal representative, be sued in England.

Provided that

(1) if the foreign personal representative sends or brings into England movables of a deceased which have not been so appropriated as to lose their character as part of the property of the deceased, an action, to which the English administrator must be a party, may be brought for their administration in England (*q*);

(2) the foreign personal representative may by his dealing with the property of the deceased incur personal liability in England (*r*).

Comment.

"It has . . . become a general doctrine of the common law, "recognised both in England and America, that no suit can be

(*n*) *Currie v. Bircham* (1822), 1 D. & R. 35.

(*o*) *In re Macnichol* (1874), L. R. 19 Eq. 81.

(*p*) *Story*, s. 513; *Beavan v. Hastings* (1856), 2 K. & J. 724; *Hervey v. Fitzpatrick* (1854), Kay, 434.

(*q*) See, especially, *Westlake*, s. 99. See also *Lowe v. Fairlie* (1817), 2 Mad. 101; *Logan v. Fairlie* (1825), 2 S. & St. 284, 291, judgment of Leach, V.-C.; *Sandilands v. Innes* (1829), 3 Sim. 263, 264, judgment of Leach, V.-C.; *Bond v. Graham* (1842), 1 Hare, 482; *Hervey v. Fitzpatrick* (1854), Kay, 421. Contrast *Arthur v. Hughes* (1841), 4 Beav. 506.

(*r*) See *Westlake*, s. 100; *Anderson v. Caunter* (1833), 2 My. & K. 763; *Twyford v. Trail* (1834), 7 Sim. 92.

"brought or maintained by any executor or administrator, or
 "against any executor or administrator [or other foreign per-
 "sonal representative] in his official capacity, in the Courts of
 "any other country, except that from which he derives his autho-
 "rity to act in virtue of the probate and letters of administration
 "there granted to him" (s). The English authorities "fully
 "establish the doctrine that, if a foreign executor or adminis-
 "trator [or other personal representative] brings or transmits
 "property here, which he has received under the administration
 "abroad, or if he is personally present, he is not either personally,
 "or in his representative capacity, liable to a suit here; nor is such
 "property liable here to creditors; but they must resort for satis-
 "faction to the forum of the original administration" (t).

These statements must, however, be taken subject to the pro-
 visos of Rule 132, which amount in substance to this: that though
 a foreign administrator or other personal representative cannot
 in England be made liable for property held, or acts done by him
 in his character of foreign administrator, yet he may by his con-
 duct place himself in some position in which he, speaking broadly,
 as a trustee, or possibly as a debtor (u), incurs legal liabilities
 which can be enforced in England (x).

Illustrations.

1. *T* dies leaving property in Italy. *X* is in Italy his personal
 representative. *A* is his English administrator. *A* cannot main-
 tain an action against *X* as personal representative of *T*, *e.g.*, to
 obtain discovery of *T*'s personal estate (y).

2. *X* is *T*'s administrator under an Indian grant of administra-
 tion. *X* comes to England bringing with him personal property
 of *T*'s which is still unappropriated, and part of *T*'s estate. *A*,
T's English administrator, can bring an action for the adminis-
 tration of such money (z).

3. *X* is the foreign personal representative of *T*, who dies in a
 foreign country. *X* is guilty of a breach of trust in omitting to

(s) Story, s. 513. Or otherwise. The foreign personal representative need
 not be in strictness an executor or administrator.

(t) *Ibid.* s. 514 b. But see *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34.

(u) See Illustrations 2—4.

(x) Note also the effect of Rule 78, p. 351, *ante*; and Rule 84, p. 374, *ante*.

(y) *Jauncy v. Sealey* (1686), 1 Vern. 397.

(z) Proviso 1. See *Lowe v. Fairlie* (1817), 2 Mad. 101; *Sandilands v. Innes*
 (1829), 3 Sim. 263; *Bond v. Graham* (1842), 1 Hare, 482.

invest moneys left under *T*'s will for the benefit of *N*. *X*, when in England, is liable, not as foreign personal representative, but as trustee, to an action for breach of trust (*a*).

4. *N*, an Englishman, dies intestate in a foreign country where he is possessed of real and personal property. *X*, his brother, who resides in England, is personal representative of *N* under the law of such foreign country, and there takes succession to *N* in a manner which renders *X* personally liable for the debts of *N*. *A*, a creditor of *N*, can maintain an action in England against *X* for a debt due from *N*, *i.e.*, *X* is liable, not as personal representative of *N*, but as being himself a debtor under the law of a foreign country (*b*).

*Extension of Irish Grant and Scottish Confirmation to
England.*

RULE 133 (*c*).—An Irish grant will, on production of the said grant to, and deposition of a copy thereof with, the proper officer of the High Court of Justice in England, be sealed with the seal of the said Court, and be thereupon of the like force and effect, and have the same operation in England, as an English grant.

RULE 134 (*d*).—A Scottish confirmation of the executor

(*a*) Proviso 2. *Twyford v. Trail* (1834), 7 Sim. 92, 108.

(*b*) See *Beavan v. Hastings* (1856), 2 K. & J. 724.

(*c*) "From and after the period at which this Act shall come into operation [1st January, 1858], when any probate or letters of administration to be granted by the Court of Probate in Ireland shall be produced to, and a copy thereof deposited with, the Registrars of the Court of Probate in England, such probate or letters of administration shall be sealed with the seal of the said last-mentioned Court, and, being duly stamped, shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England." The Probates and Letters of Administration Act (Ireland), 1857 (20 & 21 Vict. c. 79), s. 95. See also as to the Court the Government of Ireland Act, 1920 (10 & 11 Geo. 5, c. 67), s. 41.

See, further, the Judicature Act, 1873. Compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

For meaning of "Irish grant," see Rule 88, p. 381, *ante*, the comment on which applies *mutatis mutandis* to this Rule.

The mere fact that an application has been made for an Irish grant will not prevent the making of a grant in England. *Irwin v. Caruth* (1916), 86 L. J. Ch. 25; [1916] P. 23.

(*d*) "When any confirmation of the executor of a person who shall . . . have died domiciled in Scotland, which includes, besides the personal estate

of a person duly stated to have died domiciled in Scotland, which includes besides the personal estate situate in Scotland also personal estate situate in England, will, on production of such confirmation in the High Court in England and deposition of a copy thereof with the proper officer of the said Court, be sealed with the seal of the said Court, and have thereupon in England the like force and effect as an English grant.

Comment.

In accordance with this Rule a Scottish confirmation, which is equivalent to an English grant of probate or letters of administration, may, by formal proceedings, be extended to England so as to have there the operation of an English grant.

Note, however, that a Scottish confirmation can be extended to England only when the deceased is stated to have died domiciled in Scotland, and has left personal estate both in Scotland and in England. The statement that he has died domiciled in Scotland must be inserted by the proper Scottish official in or on the confirmation (*e*).

"situated in Scotland, also personal estate situated in England, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the Registrar, together with a certified copy of the Interlocutor of the Commissary finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said Court, and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate." Confirmation and Probate Act, 1858 (21 & 22 Vict. c. 56), s. 12. The action taken in England is ministerial only, and the Court of Probate has no power to refuse sealing. *In re the Estate of Rankine*, [1918] P. (C. A.) 134, 138. As to the extent of the authority of the Scottish executor over English leaseholds, see *Hood v. Lord Barrington* (1868), L. R. 6 Eq. 218.

See, further, the Judicature Act, 1873; the Sheriff Court (Scotland) Act, 1876, s. 41. Compare the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 6, 22.

And see Rule 89, p. 382, *ante*, and comment thereon.

(*e*) See 21 & 22 Vict. c. 56, ss. 12, 15; 39 & 40 Vict. c. 70, s. 41. As to the effect of the statement, see *In re De Penny*, [1891] 2 Ch. 63.

Extension of Colonial or Indian Grant to England.

RULE 135 (f).—Whenever the Colonial Probates Act, 1892, is by Order in Council made applicable to any British possession, *i.e.*, to any part of the British dominions not forming part of the United Kingdom, the grant of probate or letters of administration may, on

(1) payment of the proper duty, and

(2) production of the said grant to, and deposition of a copy thereof with, the High Court in England,

be sealed with the seal of the said Court, and shall thereupon be of the like force and effect, and have the same operation in England, as an English grant.

(f) “(1) Where a Court of Probate in a British possession, to which this Act [i.e., Colonial Probates Act, 1892] applies, has granted probate or letters of administration in respect of the estate of a deceased person, the probate or letters so granted may, on being produced to, and a copy thereof deposited with, a Court of Probate in the United Kingdom, be sealed with the seal of that Court, and thereupon, shall be of the like force and effect, and have the same operation in the United Kingdom, as if granted by that Court.

“(2) Provided that the Court shall, before sealing a probate or letters of administration under this section, be satisfied,—

“(a) that probate duty has been paid in respect of so much (if any) of the estate as is liable to probate duty in the United Kingdom;
“and,

“(b) in the case of letters of administration, that security has been given
“in a sum sufficient in amount to cover the property (if any) in
“the United Kingdom to which letters of administration relate:

“and may require such evidence, if any, as it thinks fit, as to the domicile of the deceased person.”

Colonial Probates Act, 1892 (55 Vict. c. 6), s. 2, sub-ss. (1) and (2). See, further, s. 6, and Interpretation Act, 1889, s. 18, sub-s. (2); p. 384, *ante*. The Court in England has discretionary authority in the case of colonial or Indian probates. The Act applies to all parts of the United Kingdom, but the present Rule is concerned only with its effect in England. See Rule 90, p. 384, *ante*.

As to resealing, see *In Goods of Sanders*, [1900] P. 292.

BOOK III.

CHOICE OF LAW.

THE Rules contained in Book III. deal solely with the Choice of Law (*a*).

Their object is the determination of the body of law (*b*) which is to be selected by the High Court when called upon to decide any case which has in it a foreign element (*c*).

The Rules contained in Book III. have nothing to do with the jurisdiction either of the High Court (*d*) or of foreign Courts (*e*).

But though a question as to the choice of law is in itself a totally different thing from a question of jurisdiction, there exists occasionally a difficulty in discriminating at a glance between the two inquiries; for a question as to the choice of law may look like

(*a*) As to Choice of Law, see Intro., pp. 2, 23—40, 59—64, *ante*; and compare Holland, Jurisprudence, chap. xviii.; Pillet, *Principes de Droit International Privé*, chaps. viii.—xvi.

(*b*) The body of law, whether English or foreign, which ought to be chosen for the determination of a particular case, or class of cases, depends upon the nature of the right which is in dispute, and rights are naturally divided in accordance with their subject-matter. Hence the Rules as to the Choice of Law are conveniently distributed under the following heads:—

- (1) Status or Capacity.—Chaps. xix. and xx., *post*.
- (2) Family Relations.—Chap. xxi., *post*.
- (3) Immovables.—Chap. xxiii., *post*.
- (4) Movables.—Chap. xxiv., *post*.
- (5) Contracts.—Chaps. xxv. and xxvi., *post*.
- (6) Marriage.—Chap. xxvii., *post*.
- (7) Torts.—Chap. xxviii., *post*.
- (8) Administration in Bankruptcy.—Chap. xxxix., *post*.
- (9) Administration and Distribution of Deceased's Movables.—Chap. xxx., *post*.
- (10) Succession to Movables.—Chap. xxxi., *post*.
- (11) Procedure.—Chap. xxxii., *post*.

This distribution of our subject, though convenient, makes no claim to any special logical precision.

(*c*) For meaning of "foreign element," see Intro., p. 1, *ante*.

(*d*) As to the jurisdiction of the High Court, see Book II., Part I., pp. 215—385, *ante*.

(*e*) As to the jurisdiction of Foreign Courts, see Book II., Part II., pp. 386—497, *ante*.

a question as to jurisdiction. That this is so may be shown by the following illustration: *A* brings in England an action against *X* for an assault at Paris; *X*'s defence is that the assault was by French law justifiable, and that *A* therefore cannot, in an English Court, recover damages for it. The defence looks like an objection to the jurisdiction of the Court; but this appearance will be found on examination to be delusive. Whatever be the technical form of *X*'s defence, he in substance pleads, not that the High Court has no right to adjudicate upon an assault committed in France, but that the question whether *X* was or was not guilty of an assault, *i.e.*, of an unlawful attack upon *A*, must be determined in England by reference, not to the law of England, but to the law of France. *X* therefore raises a question as to the choice of law (*f*).

(*f*) As to law governing torts, see chap. xxviii., p. 694, *post*.

CHAPTER XIX.

STATUS.

RULE 136 (*a*).—Transactions taking place in England are not affected by any status existing under foreign law which either

- (1) is of a kind unknown to English law, or
- (2) is penal.

Comment.

Status.—Every person has a certain civil status (*b*), consisting of his capacity for the acquisition and exercise of legal rights and for the performance of legal acts. Thus *A*'s status or personal condition may be that of the ordinary or average citizen, who is of full age, legitimate, unmarried, and so forth, and has incurred no legal disability. Such a person has in England the capacity to inherit, to make a will, to bind himself by contracts, to change his domicile, and the like. His status, just because it is the average or ordinary condition, receives no special name. *A*'s condition or status, on the other hand, may differ from the ordinary standard in that he has legal capacities which either fall short of or exceed those of the ordinary citizen, so that he occupies a position by virtue of which, as it has been expressed (*c*), what is law for the average citizen is not law for him. Thus, if he is illegitimate, he does not inherit in cases in which the average citizen would do so. If he is an infant, he is not bound by contracts which bind others. If he is married, he has rights and incurs liabilities beyond those of the ordinary or average citizen. As *A*'s position is in these

(*a*) Compare Intro., General Principle No. II. (B), p. 35, *ante*, and Rule 54, p. 230, *ante*. See Story, ss. 91, 92, 94—104, 620—625 *c*; *Chetti v. Chetti*, [1909] P. 67; *Rex v. Superintendent Registrar of Marriages for Hammer-smith, Ex parte Mir-Anwaruddin*, [1917] 1 K. B. (C. A.) 634.

As to how far the last clause of the Rule applies to countries subject to the British Crown?

(*b*) See, especially, Holland, *Jurisprudence*, chap. ix.

(*c*) See Westlake (1st ed.), s. 89.

instances marked off from, and contrasted with, the condition of ordinary citizens, it receives a name such as that of illegitimacy, infancy, &c., and is clearly recognized as a status; and *A* has a status which may, in very general terms, be described as being "the legal position of [*A*] in or with regard to the rest of a "community" (*d*).

From the nature of status it is apparent that the term is a relative one, varying according to the laws of different communities. A man, for example, may be legitimate if his status is to be determined by the law of France, illegitimate if it is to be determined by the law of England. In no matter, moreover, do the laws of different countries differ more widely than in their rules as to status. Conditions, such as that of slavery, monastic celibacy, or civil death, which are known to the law of one State are unknown or absolutely repugnant to the legal system of another. Conditions, again, which in one form or another exist throughout the civilized world, are in different countries governed by different rules, and involve different incidents. Minority, to take one example, may terminate under one law at 21, under another at 24, under a third at 25; and it may safely be asserted that in almost every different country the incapacities or the privileges of a minor are somewhat different.

When, therefore, it is necessary to determine what is a person's status, and how far his rights or acts are affected thereby, it is necessary, further, to determine what is the law with reference to which his status or condition must be fixed. Whether our Courts have on this subject adopted any one invariable principle may be doubted: but they have, of recent years, gone so far as to hold that an individual's legal condition is, in many cases, liable to be affected by the law of his domicile (*e*), and perhaps they may be said to have adopted, in a very general way, the rule that status depends *primâ facie* on domicile; but in practice this principle is subjected to limitations and exceptions which often go near to invalidating it (*f*).

Status unknown to English Law.—The law of England will not (*seem*) in England allow any status (such, for example, as

(*d*) *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 11, per Brett, L. J.

(*e*) See *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; *Udny v. Udny* (1869), L. R. 1 Sc. Ap. 441; *In re De Wilton*, [1900] 2 Ch. 481.

(*f*) See *Male v. Roberts* (1800), 3 Esp. N. P. 163. See, *e.g.*, Rule 158, p. 577, and Exceptions thereto, pp. 580—583, *post*.

relationship arising from adoption) (*g*), which is unknown to English law, to have legal effects as regards transactions in England. Thus, even at the time when slavery existed in the English colonies, the status of a slave was not recognized in England, and a master who brought his slave there lost the right of ownership over him whilst in England (*h*). "Slavery," it was laid down, "is "a local law, and therefore, if a man wishes to preserve his slaves, "let him attach them to him by affection, or make fast the bars of "their prison, or rivet well their chains; for the instant they get "beyond the limits where slavery is recognised by the local law "they have broken their chains, they have escaped from their "prison and are free" (*i*). On similar grounds, English Courts will not in England give effect to a polygamous marriage (*k*). Nor will they give any effect in England to disabilities arising from religious vows, from caste, from religious belief (as, for instance, where Jews or Protestants are under disabilities by the law of their domicile), or from "civil death," or "infamy" (*m*), or from a person being declared a "prodigal," and, therefore, under the law of a foreign country, incapable of suing (*n*).

Penal status.—A penal status means one which is imposed upon a person in order to deprive him of rights or to inflict punishment upon him, as where *X* is affected with attainder. Such a penal status, though inflicted by the law of the country where *X* is domiciled, and though known to English law, will not be allowed to affect *X* as regards his rights to property in England.

"It is a general principle that the penal laws of one country "cannot be taken notice of in another" (*o*). "I would," says

(*g*) An intestate dies domiciled in England. *N*, the intestate's brother, has, before the intestate's death, become domiciled in California, and has there, in accordance with the law of California, adopted *A* as his son. *N* dies before, but *A* survives, the intestate. *A* cannot (*semble*) claim the intestate's movables in England as next of kin, *i.e.*, English law does not acknowledge relationship by adoption. Cf. p. 850, *post*.

(*h*) *Sommersett's Case* (1771), 20 St. Tr. 1. See *The Slave Grace* (1827), 2 Hagg. Ad. 94.

(*i*) *Forbes v. Cochrane* (1824), 2 B. & C. 448, 467, per Best, J.

(*k*) *Hyde v. Hyde* (1866), L. R. 1 P. & D. 130. See above, p. 290.

(*l*) *Chetti v. Chetti*, [1909] P. 67, 77, 78. Incapacity on ground of religious vows in a foreign domicile was not recognized in England even when such a status was known there. Westlake (5th ed.), s. 16, citing Co. Litt. 132 b; *Re Metcalfe* (1864), 2 De G. J. S. 124.

(*m*) See Story, ss. 91, 92, 620—624; 1 Blackst. Comm., pp. 132, 133.

(*n*) See *Worms v. De Valdor* (1880), 49 L. J. Ch. 261; and compare *In re Selot's Trust*, [1902] 1 Ch. 488.

(*o*) *Ogden v. Folliott* (1790), 3 T. R. 726, 733, per Buller, J.

Lord Loughborough, "even go farther, and say a right to recover "any . . . specific property, such as plate or jewels, in this "country, would not be taken away by the criminal laws of "another. The penal laws of foreign countries are strictly local, "and affect nothing more than they can reach, and can be seized "by virtue of their authority. A fugitive who passes hither comes "with all his transitory rights; he may recover money held for his "use, stock, obligations, and the like, and cannot be affected in this "country by proceedings against him in that which he has left, "beyond the limits of which such proceedings do not extend" (p).

Illustrations.

1. A is a Californian born in California, and whilst there domiciled becomes under the law of California the adopted son of B, who at the time of the adoption is a Californian domiciled in California. He has no other son. B, after the adoption of A, becomes domiciled in England and dies there intestate, leaving money in English funds. Any right of A under Californian law to succeed to B's property in England as B's adopted son will (*semble*) not be recognized in England (q).

2. A, a French citizen domiciled in France, is a person of full age, but being of extravagant habits is, by a French Court of competent jurisdiction, adjudged to be a "prodigal," and is placed under the control of a *conseil judiciaire* (legal adviser). He is, as a prodigal, incapable of receiving or giving a receipt for his movable property without the consent of such adviser. He becomes entitled to a fund in Court in England. The status of a prodigal is unknown to English law and is a penal status. A has a right to receive the fund in Court on his own receipt, in spite of the opposition of his legal adviser (r).

(p) *Folliott v. Ogden* (1789), 1 H. Bl. 123, 135. See also *Wolff v. Oxholm* (1817), 6 M. & S. 92, 99. Compare *Lynch v. Provisional Government of Paraguay* (1871), L. R. 2 P. & D. 268; and *Huntington v. Attrill*, [1893] A. C. 150. And see Rule 54, p. 230, *ante*. So, also, as regards penalties on the remarriage of divorced persons, *Scott v. Attorney-General* (1886), 11 P. D. 128.

(q) The status of adopted child is unknown to English law. Otherwise in America. *Ross v. Ross* (1886), 129 Mass. 243.

(r) *In re Selot's Trust*, [1902] 1 Ch. 488; *Worms v. De Valdor* (1880), 49 L. J. Ch. 261. Whether the Lunacy Act, 1890 (53 Vict. c. 5), s. 108, sub-s. (3), does not create a status somewhat similar to that of the prodigal? There is, however, the fundamental distinction that the status created by the Act rests on unsoundness of mind, not on extravagance, and accordingly has no penal character.

3. A Roman Catholic priest is a citizen of, and domiciled in, a foreign country, under the law of which he is, as a priest, incapable of marriage. He marries an Englishwoman in England. The marriage is valid, *i.e.*, English law does not recognize a disability unknown to the law of England.

RULE 137 (*s*).—Any status existing under the law of a person's domicile is recognized by the Court as regards all transactions taking place wholly within the country where he is domiciled.

Comment.

Our Courts recognize every kind of status or personal condition held under the law of a country where a person is domiciled, in so far as such status affects acts done and rights exercised wholly in that country. Hence it has been laid down, with substantial accuracy, that "the status of persons with respect to acts done and "rights acquired *in the place of their domicile*, and contracts made "concerning property situated therein, will be governed by the law "of that domicile; and that England . . . will hold as valid or "invalid *such* acts, rights, and contracts, according as they are "holden valid or invalid by the law of the domicile" (*t*).

This clearly is so as regards any person domiciled in England. The transactions of such a person in England are, in so far as they may be affected by status, governed by English law. If *A*, for example, is a Frenchman domiciled in England, his capacity to contract in England depends on English law, without reference to the law of France (*u*).

The same principle applies to persons domiciled in a foreign country. If an English Court undertakes to determine the effect

(*s*) Compare Phillimore, s. 381; Wharton, s. 125. *Folliott v. Ogden* (1789), 1 H. Bl. 123, throws some doubt on the principle of this rule if carried out to its full extent. See, however, *Ogden v. Folliott* (1790) (in error), 3 T. R. 726, by which it seems that the real ground of decision was that the confiscation by the State of New York, being made during the Rebellion, was held by our Courts inoperative, even as regards property in New York. See judgment of Kenyon, C. J., 3 T. R. 731; *Newton v. Manning* (1849), 1 M. & G. 362, 364.

(*t*) Phillimore, s. 381.

(*u*) In many of the cases falling under this rule the *lex actus* (or law of the country where a transaction takes place) and the *lex domicilii* are the same. It is therefore difficult to say for certain whether the character of the transaction is determined by our Courts with a view to the *lex actus* or the *lex domicilii*. Still the law of domicile would appear to be the guiding consideration.

of acts done and rights exercised in a foreign country where a person is domiciled, the Court will recognize the effect of his status under the law of his domicile, without any reference to what would have been the status of such a person in England, or to what might or might not be the effect of his foreign status on transactions taking place in any other country than that of his domicile.

Suppose, for example, that minority lasts in a foreign country till the age of 24. If A, an Englishman who is of age at 21, is domiciled in such foreign country, and makes a gift, or sells goods, or enters into a contract there, the effect of the transaction will be judged of by our Courts with reference to whatever be the privileges or incapacities of a minor under the law of such foreign country. So, again, though civil death is not now known to our law (*x*), its effects on the rights of a person affected by it in the country where he is domiciled will be noticed by our Courts. If, for example, under the law of Spain, the property of a person who becomes a monk should devolve, say, on his heir, English law would recognize the fact of the property in Spain of a person there domiciled having, through his taking monastic vows, devolved upon his heir. In other words, our Courts would (it is conceived), to this extent at any rate, recognize the effect of the monastic status (*y*).

RULE 138 (*z*).—In cases which do not fall within Rule 136, the existence of a status existing under the law of a person's domicile is recognized by the Court, but such recognition does not necessarily involve the giving effect to the results of such status.

(*x*) See 1 Blackst. Comm., pp. 132, 133.

(*y*) Compare *Santos v. Illidge* (1860), 29 L. J. C. P. 348; 8 C. B. (N. S.) (Ex. Ch.) 861. The case is noticeable as showing the extent to which English Courts will, in regard to transactions in a foreign country, recognize the existence of conditions, such as slavery, unknown to English law. Compare *Madrazo v. Willes* (1820), 3 B. & Ald. 353.

(*z*) In support of this Rule, see the authorities given in support of the Rules as to particular kinds of status. "It is a settled rule of English law that civil "status, with its attendant rights and disabilities, depends, not upon nationality, "but upon domicile alone." Judgment of P. C., *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, 437.

Compare *Armytage v. Armytage*, [1898] P. 178, 186, judgment of Sir J. Gorell Barnes.

Comment.

Three views as to status.—Three opinions, at least, may be held as to the relation between a person's status, or personal capacity, and the law of his domicile.

First view. A person's status depends (subject to certain exceptions coinciding in the main with cases falling under Rule 136) wholly on the law of his domicile.

This is the view maintained by many foreign jurists, and notably by Savigny (*a*).

According to this opinion, a person who is legitimate, or a minor, by the law of his domicile, is to be considered as legitimate or a minor all the world over. Thus, if *A*, a person domiciled in Scotland, is legitimate by the law of Scotland, he ought, though born out of lawful wedlock (*b*), to be considered legitimate in England. So an Englishman, domiciled in a foreign country where minority lasts till 24, who is of the age of 22 should, according to the view we are now considering, be treated as a minor in England till 24, and on similar grounds a domiciled Englishman of 22 ought to be considered of full age in such foreign country.

From this view the consequence logically follows that not only the fact of a person having a particular status, *e.g.*, of legitimacy, but also all the legal effects of such status, ought to be everywhere determined by the law of his domicile. If, for example, *A* is legitimate under the law of his Scottish domicile on account of his parents having married after his birth, he not only ought to be considered legitimate in England, but ought also (though he would be illegitimate according to English local law) to possess in England all the privileges of legitimacy, both as to the inheritance of real estate and otherwise.

A person's civil status, in short, ought, on this view, to be "governed universally by one single principle, namely, that of "domicil, which is the criterion established by law for the purpose "of determining civil status" (*c*).

This principle has never been fully accepted by our Courts, though of recent years they have shown a marked inclination to adopt it (*d*).

(*a*) Savigny, s. 362, Guthrie's transl. (2nd ed.), p. 148.

(*b*) Compare Rule 146, p. 521, *post*.

(*c*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, per Lord Westbury; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1.

(*d*) The verbal admission of the correctness of this principle has been combined with the practical refusal to adopt it by means of considering features in

Second view. No status conferred only by the law of a person's domicile is to be recognized as regards transactions taking place in another country.

This view is, in its most extreme form, the exact opposite of the first theory. If it were completely carried out, it would make status a matter purely of local law. No civilized State has ever fully adopted it, and English Courts have certainly never gone the length of applying it, at any rate in its full extent, to the status of persons domiciled in England; and a comparison of more or less recent cases (e) exhibits on the whole a distinct tendency on the part of English Courts to approximate in practice to the theory that a person's status is governed by his *lex domicilii*. Eminent writers have, however, held that the view now under consideration was at one time adopted by English law with regard to the status of persons domiciled in a foreign country (f).

a legal transaction, which in fact involve questions of status, as belonging to the form of the transaction, and therefore as depending on the *lex loci contractus*, or, in more general terms, on the *lex actus*, or law of the country where the transaction takes place. Thus, the necessity for the consent of parents to the marriage of a minor has been treated as belonging to the formalities of the marriage. *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. See *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46.

Those countries which, like Italy, wholly disconnect status and domicile by making personal condition depend, not upon domicile, but upon nationality or allegiance (Codice Civile del Regno d'Italia, Art. 6), adopt a view which at bottom is not very dissimilar from the first view, which we may call that of Savigny; though differing from him as to the test by which to determine what is the country to which an individual belongs, they agree with him in holding that a person's status under the law of the country to which he belongs ought to be his status in every other country.

(e) *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *Goodman v. Goodman* (1862), 3 Giff. 643; *Boyes v. Bedale* (1863), 1 H. & M. 798; 33 L. J. Ch. 283; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. But contrast *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. P. & M. 97; *Ogden v. Ogden*, [1908] P. (C. A.) 46.

Contrast with the present state of things the statement of Westlake in the first edition of his work on Private International Law: "While the English law 'remains as it is, it must, on principle, be taken as excluding, in the case of 'transactions having their seat here, not only a foreign age of majority, but 'also all foreign determination of status or capacity, whether made by law or 'by judicial act, since no difference can be established between the cases, nor 'does any exist on the continent.'" Westlake (1st ed.), s. 402, p. 384. This language, which does not re-appear in the later editions of Mr. Westlake's work, accurately represented English law as it existed in 1858, but does not represent English law as it exists at the present day; it has been greatly modified by the judicial decisions of the last fifty years.

(f) See Westlake (1st ed.), s. 402, and compare Story, s. 98.

Third view. The existence, at any rate, of a status imposed by the law of a person's domicile ought in general to be recognized in other countries, though the Courts of such countries may exercise their discretion in giving operation to the results or effects of such status.

This is the principle (if so it can be called) which is meant to be stated in Rule 138 (*g*), and which, it is conceived, most nearly corresponds with the actual practice of our Courts. It constitutes a kind of practical compromise between the first and the second views (*h*), and enables the Courts to recognize the existence of a status acquired under the law of a person's domicile, while avoiding the practical difficulties which arise from subjecting legal transactions to rules of law which may be unknown in the country where the transaction takes place.

The operation of Rule 138 may be thus illustrated:—

The son of a father domiciled in France is legitimate, according to the law of France, in consequence of the marriage of his parents after his birth. His legitimacy is certainly for some purposes recognized by English Courts (*i*). On the other hand, he is not allowed by English tribunals the whole of the advantages which, had he been born after his parents' marriage, would have accrued to him under English law as his father's heir, for he is not allowed to succeed to English real estate (*k*).

(*g*) See p. 505, *ante*.

(*h*) This principle comes very near to the opinion of some jurists that a distinction ought to be made between the existence of a status—for example, minority—and the legal results or effects of it, and that, while the existence of the status ought to be determined wholly by the law of the person's domicile, the extent to which effect should be given in other countries to the results of such status, *e.g.*, to the minor's incapacity to contract, depends upon other laws, as, for example, the *lex loci contractus*, or the law of the place where the contract is made. As a speculative view, this opinion is obviously open to criticism, but its inconsistency represents in a theoretical form the difficulty which the Courts of any country are certain to feel in practice of either, on the one hand, referring questions of status wholly to the *lex domicilii*, or, on the other hand, entirely refusing recognition to personal conditions imposed by the law of a person's domicile.

The great practical inconvenience of holding that a man of twenty-four who enters into a contract in England is not bound by it here, because by the law of his foreign domicile he is a minor, may be taken as one illustration of the difficulty of carrying out to the full the principle that status depends upon the law of domicile.

See, as to the difference between the recognition and the enforcement of a right, Intro., p. 31, *ante*.

(*i*) *Skottowe v. Young* (1871), L. R. 11 Eq. 474.

(*k*) Rule 146, p. 521, *post*.

So, again, a person's appointment as guardian of a minor under the minor's *lex domicilii* is certainly recognized as a fact by English judges (*l*), but it cannot be said that the powers of a foreign guardian have always, as such, been recognized in England (*m*).

When the bearing of our Rule is understood, two points with regard to it become apparent.

The Rule, in the first place, though it is all which can be extracted by way of principle from decided cases, is seen to be so vague as to be of comparatively little use for practical purposes. The fact that the existence of a particular status under a person's *lex domicilii* is generally recognized does not answer the important question how far the capacities or incapacities of an individual under the law, for example, of his French domicile, will be allowed by English Courts to affect transactions in England. The answer to this inquiry (as far as, in the dearth of authorities, it can be given at all) must be sought for in the rules deducible from English decisions with regard to the recognition to be given to particular kinds of personal condition or status (*n*).

The Rule, in the second place, applies to two different classes of cases, that is to say, to cases in which English Courts have to consider the effect to be given to an English status as regards transactions taking place out of England, and to cases in which English Courts have to consider the effect to be given to a foreign status as regards transactions taking place in England.

When, however, the decisions as to particular kinds of status are examined, it will be found that they throw, comparatively speaking, little light on the answer to the question what are the limits within which our Courts will recognize the effect of an English status on transactions taking place abroad. We may probably, indeed, conclude that their inclination will be to give

(*l*) See *Nugent v. Vetzera* (1886), L. R. 2 Eq. 704; *Di Savini v. Lousada* (1870), 18 W. R. 425.

(*m*) *Stuart v. Bute* (1861), 9 H. L. C. 440. See Rule 144, p. 517, *post*. A grant of administration cannot be made to a minor even if emancipated by the law of his foreign domicile. In *Goods of Duchess d'Orléans* (1859), 1 Sw. & Tr. 253; 28 L. J. P. & M. 128. But a legacy bequeathed by a testator domiciled in England may be paid to a person who is a minor by English law if he has attained majority by the law of his domicile (*In re Hellmann* (1866), L. R. 2 Eq. 363), or is emancipated under that law (*Re Da Cunha* (1828), 1 Hagg. Ecc. 237).

(*n*) Rule 136, p. 500, *ante*, must always be borne in mind. It denies any effect as regards transactions in England to whole classes of personal conditions, e.g., slavery.

effect to an English status as regards transactions in a foreign country; thus, a British subject is, under English law, guilty of bigamy, if having obtained a divorce from his wife in a foreign country where he is not domiciled, he, during his wife's lifetime, marries another woman (*o*). A person domiciled in England is incapable of marrying his deceased wife's niece, and cannot rid himself of his incapacity by marrying in a country where such marriage is lawful (*p*); and a person whose father is domiciled in England, and who is born out of lawful wedlock, is incapable of legitimation under the law of a foreign country (*q*). On the other hand, the tendency of our Courts is to hold that, as regards, at any rate, capacity to contract, the effect of an English status is, even in the case of a domiciled Englishman, sometimes overridden by the law of the country where the contract is made (*r*).

The decisions throw more light on the answer to the inquiry, what are the limits within which our Courts will recognize the effect of a foreign status on transactions taking place in England, and make it possible to lay down in several cases rules with regard to the effect of a given foreign status. These rules may be considered applications of Rule 138.

(*o*) *Lolley's Case* (1812), 2 Cl. & F. 567 (n.); *R. v. Russell* (1901), 70 L. J. K. B. 998; [1901] A. C. 446. The divorce is in England a nullity. See Rule 99, p. 420, *ante*.

(*p*) *Brook v. Brook* (1861), 9 H. L. C. 193, and chap. xxvii., Rules 182, 183, pp. 661—685, *post*.

(*q*) *Re Wright's Trusts* (1856), 25 L. J. Ch. 621; 2 K. & J. 595.

(*r*) See Exception 1, p. 580, to Rule 158, *post*; 2 Fraser, *Treatise on Husband and Wife* (2nd ed.), pp. 1317, 1318.

CHAPTER XX.

STATUS OF CORPORATIONS (a).

RULE 139 (b).—The existence of a foreign corporation duly created under the law of a foreign country is recognized by the Court.

Comment.

The principle is now well established that a corporation duly created in one country should be recognized as a corporation by other countries. Thus it is a matter of daily experience that foreign corporations sue and are sued in their corporate capacity before English tribunals (c).

RULE 140 (d).—The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country where the transaction occurs.

Comment and Illustrations.

The power or capacity of a corporation is limited in a twofold manner.

First. Its capacity is limited by its constitution. A corporation, for example, which is prohibited by its constitution from the

(a) As to foreign corporations, see 2 Lindley, *Company Law* (6th ed.), Appendix, No. 1; *Foreign Companies*, pp. 1221—1228; Westlake, chap. xvi.; Foote (4th ed.), pp. 125—147; Wharton, ss. 105, 105 d; and *La Société Anonyme des Anciens Établissements Panhard et Levassor v. Panhard Levassor Motor Co.*, [1901] 2 Ch. 513; *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A. C. 566. Whether a partnership is a corporation depends on the law of the country in which it is formed. *Hellfeld v. Rechnitzer*, [1914] 1 Ch. (C. A.) 746.

(b) See Intro., General Principle No. 1., p. 23, *ante*.

(c) Service out of the jurisdiction is permissible in the case of a foreign corporation in the same circumstances as in that of a natural person. *Westman v. Aktiebolaget, &c.* (1876), 1 Ex. D. 237; *Scott v. Royal Wax Candle Co.* (1876), 1 Q. B. D. 404.

(d) Lindley, *Company Law* (6th ed.), p. 1226.

purchase of land, has no power to effect a valid purchase of land in any country; for the corporation exists as such only by virtue of its constitution, and any acts done in contravention of its constitution by its directors or others are *ultra vires*, and in strictness not the acts of the corporation.

Secondly. Its capacity is limited by the law of the country where a given transaction takes place. It cannot do any act forbidden by the law of such country.

Thus a foreign corporation authorised by its constitution to acquire and hold land cannot hold land in England in contravention of the Mortmain Acts (e).

Similarly an English corporation empowered by its terms of association to purchase land, work mines, &c. in a foreign country, cannot obtain land in a colony or other foreign country if the holding of land by a corporation is prohibited by the laws of such foreign country.

Practically the most important question which arises "with reference to foreign companies, relates to the personal liabilities of their members. If a company is incorporated by a foreign government, so that by the constitution of the company the members are rendered wholly irresponsible, or only to a limited extent responsible, for the debts and engagements of the company, the liability of the members, as such, will be the same in [England] as in the country which created the corporation (f). But, with respect to unincorporated companies, the measure of liability in respect of any given transaction, seems, upon principle, to depend upon the law of the place where the transaction in question occurred (*lex loci contractus*). The law of agency, as administered in that place, would, it is conceived, have to be applied; and the law of the place where the company might be considered as domiciled would only be material for the purpose of determining the authority given by the members to the agents by whom the transactions in question were conducted" (g).

1. X takes shares in an English company constituted under the Joint Stock Companies Acts as a limited company for the carrying on of a mining business in California. The company works a mine there, and incurs a debt for which, under Californian

(e) Compare *Great West Saddlery Co. v. The King* (1921), 37 T. L. R. 436.

(f) *General Steam Navigation Co. v. Guillon* (1843), 11 M. & W. 877. Compare *Bateman v. Service* (1881), 6 App. Cas. 386; p. 406, note (u), *ante*.

(g) 2 Lindley, *Company Law* (6th ed.), p. 1227. See *Maunder v. Lloyd* (1862), 2 J. & H. 718; Story, s. 320 a; and Rule 180, p. 656, *post*.

law, *X* is, as a member of the company, personally liable. An action is brought in England against *X* for the recovery of the debt. *X* is not liable, *i.e.*, *X*'s liability is limited by the constitution of the company (*h*).

2. The same principle applies (it is submitted) if *X* is a member of a Victorian company constituted under the law of Victoria for carrying on business in England. Whether *X* is personally liable for the debts of the company incurred in England depends upon the answer to the inquiry whether he is or is not liable according to the law of Victoria—*i.e.*, depends upon the constitution of the company.

(*h*) *Risdon Iron and Locomotive Works v. Furness*, [1906] 1 K. B. (C. A.) 49.

CHAPTER XXI.

FAMILY RELATIONS.

(A) HUSBAND AND WIFE.

RULE 141 (a).—The authority of a husband as regards the person of his wife while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England (*b*).

Comment.

The question, what amount of control a husband may exercise over the freedom of his wife, and what amount of force (if any) he may use in controlling her, must be answered with reference to the law of the place where they are residing.

Our Courts certainly would not allow a foreigner, when in England, whatever might be his domicile, to exercise over his wife any power which might not be lawfully exercised by an Englishman. It seems, also, that a foreigner, resident with his wife in England, may, though not domiciled here, apply to our Courts for restitution of conjugal rights (*c*).

(B) PARENT AND CHILD (*d*).

RULE 142 (e).—The authority of a parent as regards the person of his child while in England is not affected by the nationality or the domicile of the parties, but is governed wholly by the law of England.

(*a*) See Wharton, s. 120; *Polydore v. Prince* (Am.), Ware, 402; Phillimore, s. 486. As to effect of marriage on property of husband and wife, see in reference to immovables, Rule 150, p. 542, and pp. 546, 553—556, *post*, and to movables, Rules 184—186, pp. 684—691, *post*.

(*b*) As to meaning of law of England, see pp. 79—82, *ante*.

(*c*) See *Connelly v. Connelly* (1851), 7 Moore, P. O. 438; *Cooper King v. Cooper King*, [1900] P. 65.

(*d*) See Story, s. 463 a; Westlake (5th ed.), p. 4; Phillimore, ss. 522—531; Wharton, ss. 253, 254.

(*e*) See *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 114; *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704. The matter is really one of public law, not of civil rights, and foreign law is, therefore, inapplicable.

Comment.

By the law of England, the parental authority of a foreign father over his child is recognized, but "the authority so recognized is only that which exists by the law of England. If, by the law of the country to which the parties belonged, the authority of the father was much more extensive and arbitrary than in this country, is it supposed that the father would be permitted here to transgress the power which the law of this country allows? If not, then the law of this country regulates the authority of the parent of a foreign child living in England by the laws of England, and not by the laws of the country to which the child belongs" (f).

A Frenchman, domiciled in France, is travelling in England with his son 10 years old. He flogs the child for some fault. Whatever the laws of France, the father's authority to administer such punishment cannot be questioned in an English Court, since he has not exceeded the limits of authority recognized by English law. If, again, the French father, in punishing his son, exceeds the limits of what is deemed by English law reasonable chastisement when inflicted by an English parent, he cannot justify his conduct here by showing that the punishment is allowed by French law.

RULE 143 (g).—The rights of a parent domiciled in a foreign country over the movables in England belonging to a minor are, possibly, governed by the law of the parent's domicile, but are more probably governed, while the minor is in England, by the law of England (?).

Comment.

There is little or no authority (except one case) as to a foreign father's rights in respect of the movables of a minor. The tendency of English law to follow the maxim, *mobilia sequuntur personam*, rather favours the view that the parent's rights may depend on the *lex domicilii*. But the case itself (g) is not decisive. *H*, an Englishman domiciled in Holland, married *W* in Holland, where

(f) *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 114.

(g) *Gambier v. Gambier* (1835), 7 Sim. Rep. 263. As to immovables, see Rule 150, p. 542, *post*. In *Edinburgh v. Kirk* (1905), L. T. Newspaper, 160, it was held by a county court that the liability of a son for the maintenance of his parents depended on domicile.

W was then domiciled. Under the marriage settlement of *W*, and a subsequent judicial compromise in Holland, their children became, on *W*'s death, entitled to one-fourth of certain property of *W*'s in the English funds. By the Code Napoléon, which is the law of Holland, a surviving parent has, while children are under the age of 18, the enjoyment of their property. *H* and *W* removed to, and became domiciled in, England, and had children born to them there. *W* died, and, the children being under 18, the question arose as to *H*'s rights in respect of their property in the English funds. It was held that *H* had no right to it.

The grounds of the decision were thus explained:—

“ By the Code Napoléon, which is the law of Holland, as well
 “ as of France, when children are under the age of 18 their sur-
 “ viving parent has the enjoyment of their property until they
 “ attain that age. *But that is nothing more than a mere local*
 “ *right, given to the surviving parent by the law of a particular*
 “ *country, so long as the children remain subject to that law; and,*
 “ *as soon as the children are in a country where that law is not in*
 “ *force, their rights must be determined by the law of the country*
 “ *where they happen to be. These children were never subject to*
 “ *the law of Holland; they were both born in this country, and*
 “ *have resided there ever since.* The consequence is, that this
 “ judicial decree has adjudged certain property to belong to two
 “ British-born subjects domiciled in this country; and, so long as
 “ they are domiciled in this country, their personal property must
 “ be administered according to the law of this country. *The claim*
 “ *of their father does not arise by virtue of the contract, but solely*
 “ *by the local law of the country where he was residing at the time*
 “ *of his marriage; and therefore this property must be considered*
 “ just as if it had been an English legacy given to the children;
 “ and all that the father is entitled to, is the usual reference to the
 “ Master, to inquire what allowance ought to be made to him for
 “ the past and future maintenance of his children ” (*h*).

All the parties were *domiciled* in England, and therefore the case may have been decided on the ground of domicile; but the expressions in the judgment seem to imply that the rights of the children were to be determined by the law, not of the domicile, but of the country where they happened to be, which in this case was England, although the same country was, as it chanced, that of their domicile.

(*h*) *Gambier v. Gambier* (1835), 7 Sim. 263, 270, per Shadwell, V.-C.

(C) GUARDIAN AND WARD (*i*).

RULE 144.—A guardian appointed under the law of a foreign country can exercise at the discretion of the Court control over the person of his ward in England, and over movables belonging to his ward situate in England.

Comment.

There has been a clear development in the English law as to this topic. The earlier view treated guardianship as substantially, local, and a part of the administrative law of each country, without extra-territorial validity. Hence, in 1843, it was held (*k*) that a guardian appointed in Scotland held no authority in England, and other guardians were appointed, and in this case it was said that:—

“Foreign tutors and curators . . . cannot be English guardians without being able to derive their authority from some one of those sources from which the English law considers that the right of guardianship must proceed; and it has before been shown that the rights and duties of a foreign tutor and curator cannot be recognized by the Courts of this country with reference to a child residing in this country. The result is, that such foreign tutor and curator can have no right, as such, in this country; and this so necessarily follows from reason, and from the rules which regulate in this respect the practice of the Court of Chancery, that it could not be expected that any authority upon the subject would be found” (*l*).

The more recent, and reasonable, doctrine recognizes the existence of the foreign guardianship as conferring rights which the Court should normally confirm if they are called into question. Hence where two infants, Austrian subjects, were sent to England for education, the Court of Chancery refused to interfere with the discretion of the guardian, appointed by an Austrian Court of competent jurisdiction, when he wished to remove them from England in order to complete their education in Austria;

(*i*) *Nugent v. Vetzera* (1866), L. R. 2 Eq. 704; *Stuart v. Bute* (1861), 9 H. L. C. 440; *Di Savini v. Lousada* (1870), 18 W. R. 425; *Johnstone v. Beattie* (1843), 10 Cl. & F. 42; *In re Chatard's Settlement*, [1899] 1 Ch. 712; *Story*, ss. 499, 499 a; *Phillimore*, ss. 543—553 a.

(*k*) *Johnstone v. Beattie* (1843), 10 Cl. & F. 42.

(*l*) *Ibid.*, p. 114, per Lord Cottenham.

but, English guardians having been already appointed, the Court refused to discharge the order by which they were appointed, and merely reserved to the foreign guardian the exclusive custody of the children, to which he was entitled by the order of the foreign Court (*m*). The principles which guided the Court were explained as follows:—

“I am now asked in effect to set aside the order of the Austrian Court, and declare that this gentleman so appointed cannot recall his wards, who have been sent to this country for the purpose of their education. It would be fraught with consequences of very serious difficulty, and contrary to all principles of right and justice, if this Court were to hold that when a parent or guardian (for a guardian stands exactly in the same position as a parent) in a foreign country avails himself of the opportunity for education afforded by this country, and sends his children over here, he must do it at the risk of never being able to recall them, because this Court might be of opinion that an English course of education is better than that adopted in the country to which they belong. I cannot conceive anything more starting than such a notion, which would involve, on the other hand, this result, that an English ward could not be sent to France for his holidays without the risk of his being kept there and educated in the Roman Catholic religion, with no power to the father or guardian to recall the child. Surely such a state of jurisprudence would put an end to all interchange of friendship between civilised communities. What I have before me is nothing more or less than that case” (*n*).

“With respect to the English guardians of these children, I hold that the Court has power to appoint them, and I continue those that have been appointed. The case may well happen of foreign children in this country without anyone to look after or care for them, or who may require the protection of this Court to save them from being robbed and despoiled by those who ought to protect them. These children, on the other hand, seem to have met with nothing but kindness from their relations on all sides, but it may be desirable that, so long as they remain in this country, they should have the protection of guardians living within the jurisdiction. Out of respect to the authority

(*m*) *Nugent v. Fetzera* (1866), L. R. 2 Eq. 704. Compare *Stuart v. Bute* (1861), 9 H. L. C. 440, 470, which modified considerably the doctrine laid down in *Johnstone v. Beattie*.

(*n*) *Nugent v. Fetzera* (1866), L. R. 2 Eq. 712, per Wood, V.-C.

"of the Austrian Courts, by which this gentleman has been appointed, I reserve to him, in the order I am about to make, all such power and control as might have been exercised over these children in their own country if they were there, and had not been sent to England for a temporary purpose. Taking that view of the case, I have not asked to see the children. I could not be influenced by anything I might hear from them. I assume that they are most anxious to remain here, and not to go back to their own country; but I have no right to deprive the guardian appointed by the foreign Court over them of the control which he has lawfully and properly acquired, has never relinquished and never abandoned, and under which authority alone they have remained here and been maintained and supported here" (o).

Where an Italian Court had appointed guardians for an Italian infant, who came to England, and, being made a ward in Chancery, was, with the consent of the Italian guardians, placed in the custody of English guardians, who did not carry out the directions of the Italian guardians, the Court of Chancery, upon the application of the Italian Court, appointed new guardians, and declared its readiness to carry out in all respects the orders of the Italian Courts with regard to the infant as far as might be consistent with the laws of England (p).

As in the case of parental and marital rights of control, the power of a foreign guardian over his ward is limited to the power possessed by a guardian under English law, *mutatis mutandis* (q). Thus normally a guardian appointed in Italy for an Italian ward may remove the latter from England without exposing himself to any legal proceedings (r).

As regards the movable property of a ward situate in England it appears in principle (s) that the guardian's power of disposal

(o) *Ibid.*, pp. 714, 715, per Wood, V.-C.

(p) *Di Savini v. Lousada* (1870), 18 W. R. 425.

(q) See *Johnstone v. Beattie* (1843), 10 Cl. & F. 42, 113, 114, per Lord Cottenham; the language of Wood, V.-C., in *L. R. 2 Eq. 714* (cited on p. 518), is wider in terms, but it does not appear that it was meant to admit the right of the exercise by a guardian of methods of control disapproved by English law.

(r) *Nugent v. Vetzera* (1866), *L. R. 2 Eq. 712*. Contrast *Dawson v. Jay* (1854), 3 De G. M. & G. 764, which is explained by Lord Campbell; *Stuart v. Bute* (1861), 9 H. L. C. 440, 467, as depending on the special circumstances of that case.

(s) It is expressly stated in the judgment of Kekewich, J., in *In re Chatard's Settlement*, [1899] 1 Ch. 712, 716, that a trustee would have had a legal discharge if he had paid trust funds to the guardian of the infants; what, how-

should be regulated by the law of the country to which he owes his appointment as guardian, and it has been held (*t*) that a Scottish *factor loco tutoris* and *curator bonis* is the proper person to retain the English assets of Scottish minors. But the actions of the guardian are subject to the control of the Court, which may in a suitable case treat a foreign minor as a ward of Court (*u*).

The authority of a guardian who is not appointed by the Court of the foreign infant's domicile (*e.g.*, of a guardian appointed by a French Court for an Italian infant), will, it is conceived, not be recognized in England.

(D) LEGITIMACY (*x*).

RULE 145.—A child born anywhere in lawful wedlock is legitimate.

Comment.

If any dispute arises as to the legitimacy of a child ostensibly born in lawful wedlock, it will be found that the matter in dispute is not the soundness of Rule 145, but either the validity of the

ever, that case established is that, where there is a fund in Court, the Court need not order payment out to a foreign guardian as a matter of right, but may if it thinks fit require proof that the funds will be duly applied by the guardian. Compare the decision of an analogous point in regard to the curator of a lunatic, *Pélegrin v. Coutts & Co.*, [1915] 1 Ch. 696, where it was held that a bank ought to have paid over funds of a lunatic to a foreign curator without requiring the latter to obtain an order from the Court.

(*t*) *Mackie v. Darling* (1871), L. R. 12 Eq. 319; *In re Crichton's Trust* (1855), 22 L. T. (O. S.) 267. Compare *In re Brown's Trust* (1865), 12 L. T. 488, in which payment was ordered to the father of an infant as guardian under the law of Prussia. Contrast *In re Hellmann* (1866), L. R. 2 Eq. 363, in which payment was refused in analogous circumstances, showing that the Court has a discretion. That case, however, is very briefly reported and the matter seems to have been hardly argued at all.

(*u*) *Brown v. Collins* (1883), 25 Ch. D. 56. Where a minor residing abroad is a necessary party and the foreign guardian does not appear, the Court can appoint a guardian *ad litem*. *White v. Duvernay*, [1891] P. 290. For exceptional cases of the appointment of guardians for infants domiciled abroad, see *In re Willoughby* (1885), 30 Ch. D. (C. A.) 324; *In re Pavitt*, [1907] 1 Ir. R. 234, both cases which can be explained on the doctrine of *renvoi*, the French Courts referring the appointment to English law, as the national law. Contrast *In re Bourgoise* (1889), 41 Ch. D. (C. A.) 310, where the French Court had full jurisdiction.

(*x*) See Story, ss. 87 a, 93—93 w, 105, 106; Westlake (5th ed.), ss. 53—58; Phillimore, ss. 532—542; Wharton, ss. 240—250; Savigny, Guthrie's transl., a. 380, pp. 302, 308—317. See App., Note 19, "Legitimation."

marriage (*y*), or the fact of the child being born in wedlock. The principle itself, expressed in the Rule, is beyond dispute.

RULE 146.—The law of the father's domicile at the time of the birth (*z*) of a child born out of lawful wedlock, and the law of the father's domicile at the time of the subsequent marriage (*a*) of the child's parents, determine whether the child becomes, or may become, legitimate in consequence of the subsequent marriage of the parents (*legitimatío per subsequens matrimonium*).

Case I.—If *both* the law of the father's domicile at the time of the birth of the child *and* the law of the father's domicile at the time of the subsequent marriage allow of *legitimatío per subsequens matrimonium*, the child becomes, or may become (*b*), legitimate on the marriage of the parents (*c*).

Case 2.—If the law of the father's domicile at the time of the birth of the child does not allow of *legitimatío per subsequens matrimonium*, the

(*y*) See as to Validity of Marriage, chap. xxvii., Rules 182, 183, pp. 661—685, *post*. The child of a parent who has been divorced otherwise than in accordance with the law of his domicile is not legitimate in the view of English law. *Shaw v. Gould* (1868), L. R. 3 H. L. 55; *In re Stirling*, [1908] 2 Ch. 344. Where, as in Scotland, a child may be recognized as legitimate despite the nullity of the marriage (*e.g.*, on the ground of propinquity unknown to the parties), it may be presumed that the child would be treated as legitimate by English law.

(*z*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621.

(*a*) *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216; *Westlake*, ss. 54, 55.

(*b*) It is not certain that he will become legitimate on the marriage of his parents, since the law of the country where the father is then domiciled may for the purpose of legitimation require something more than the marriage; it may, for example, require that the father should go through some additional ceremony or formality, *e.g.*, registration of the child, which is required in Australia, or that he should not, between the child's birth and the subsequent marriage with the child's mother, have been married to any other woman.

(*c*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Vaucher v. Solicitor to Treasury*, *In re Grove* (1888), 40 Ch. D. (C. A.) 216; *Moffett v. Moffett*, [1920] 1 Ir. R. (C. A.) 57.

child does not become legitimate on the marriage of the parents (*d*).

Case 3.—If the law of the father's domicile at the time of the subsequent marriage of the child's parents does not allow of *legitimatio per subsequens matrimonium*, the child does not become legitimate on the marriage of the parents (*e*).

Provided that a person born out of lawful wedlock cannot be heir to English real estate, nor can anyone, except his issue, inherit English real estate from him (*f*).

Comment and Illustrations.

According to the law of England, and originally of the Northern States of America, and of all countries governed by the English common law, a child born before the marriage of his parents cannot be legitimated by their subsequent marriage. According to the law of Scotland, of France, and of most countries which have adopted, or have been influenced by, the law of Rome, such a child is or may be legitimated by the subsequent marriage of the parents. These countries, in short, allow what is technically known as *legitimatio per subsequens matrimonium* (*g*).

(*d*) *Re Wright's Trusts* (1856), 2 K. & J. 595; 25 L. J. Ch. 621; *Shedden v. Patrick* (1854), 1 Macq. 535; *Munro v. Saunders* (1832), 6 Bli. 468; *Dalhousie v. M'Douall* (1840), 7 Cl. & F. 817; *Munro v. Munro* (1840), 7 Cl. & F. 842.

(*e*) *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216. As to meaning of "marriage," see chap. xxvii., Rule 182, p. 661, *post*.

(*f*) *Birtwhistle v. Vardill* (1835), 2 Cl. & F. 571; *In re Don's Estate* (1857), 4 Drew. 194; 27 L. J. Ch. 98.

The principle of this proviso applies (it is submitted) whenever the child is the offspring of a marriage prohibited by the law of England, *e.g.*, the marriage of a man with his deceased wife's niece. Such a marriage, when celebrated in a country, *e.g.*, Canada, by persons there domiciled, is valid even in England (compare, for the principle, *In re Bozzelli's Settlement*, [1902] 1 Ch. 751); but the child of such marriage, though legitimate, cannot be heir to English land. See *Fenton v. Livingstone* (1859), 3 Macq. 497, and compare opinion of J. Westlake, Parliamentary Paper, No. 145, 3rd April, 1876.

(*g*) Even in British possessions which retain the common law, legitimation has been widely provided for by legislation, and the practice is now recognized by nearly all the States of the United States. Since 1910 an illegitimate child has been treated, for the purpose of the relief accorded to payers of income tax, as included in the definition of "child" in the Income Tax Act, if its parents have married each other. Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 68.

This fundamental difference of law has given rise to various questions as to the extra-territorial effect produced on the legitimacy of a child by the marriage of his parents after his birth. Whether, for example, a child born in Scotland is to be considered legitimate in England on the subsequent marriage of his parents in Scotland or England; whether a child born in England of parents domiciled in Scotland becomes legitimate on the marriage of its parents in England or in Scotland; whether regard is to be had to the place of birth or to the place of marriage; and other inquiries of the same kind—have (in consequence of the difference between English and Scottish law) constantly come before the English Courts, or before the House of Lords sitting as a Court of Appeal from Scotland (*h*).

After some fluctuation in the decisions, the principle stated in Rule 146 has been well established. The test whether the subsequent marriage of a child's parents can legitimate him is the law of the father's domicile at the time of the child's birth (*i*), taken in combination with the law of the father's domicile at the time of the subsequent marriage.

This principle applies to three different cases:—

Case 1.—If the law of the country (for example, Scotland) where the father is domiciled (not necessarily where he is resident) at the time of a child's birth, and also of the country (for example, France) where the father is domiciled at the time of the marriage with the child's mother, recognizes *legitimatio per subsequens matrimonium*, the child, though born before the marriage of his parents, may become legitimate on their subsequent marriage. Thus, where the child's father was domiciled, though not residing, in Scotland at the time of the child's birth in England, it was held that the subsequent marriage of his parents whilst the father retained his Scottish domicile made the child legitimate (*k*).

(*h*) Most of the decisions on this subject are given by the House of Lords as a Scottish Court of Appeal; but it is conceived that the principles laid down, e.g., in *Udny v. Udny*, may be taken as generally binding, and would be adhered to by the House of Lords when sitting as an English Court. See especially *Vaucher v. Solicitor to Treasury, In re Grove* (1888), 40 Ch. D. (C. A.) 216, which determines that the subsequent marriage of a child's parents does not legitimate him if, at the time of the marriage, the father is domiciled in a country the law whereof does not allow of *legitimatio per subsequens matrimonium*.

(*i*) Or conception, in cases where the law of the father's domicile makes this period and not birth the decisive factor, as is probably the rule in Scotland (Fraser, *Parent and Child*, p. 41) and apparently under the Roman-Dutch law.

(*k*) *Munro v. Munro* (1840), 7 Cl. & F. 842.

Case 2.—If the law of the country (for example, England or New York) where the father is domiciled at the time of the child's birth does not allow of *legitimatio per subsequens matrimonium*, no subsequent marriage will avail to make the child legitimate.

Thus, where an Englishman, domiciled in England, had, while residing in France, a child by a Frenchwoman, herself domiciled in France, it was held that the subsequent marriage of the parents did not legitimate the child (*l*). This was a particularly strong case, because the father had, after the birth of the child but before the marriage, acquired a French domicile.

Case 3.—If, lastly, the law of the country (for example, England) where the father is domiciled at the time of the subsequent marriage with the child's mother does not allow of *legitimatio per subsequens matrimonium*, the marriage will not avail to make the child legitimate.

Thus, where a Genevese citizen was at the time of the birth of his child domiciled at Geneva, the law whereof allowed of *legitimatio per subsequens matrimonium*, and, having afterwards obtained an English domicile, then married the child's mother, it was held that the subsequent marriage did not legitimate the child (*m*). "In my opinion," says Cotton, L.J., "the domicile at birth must give a capacity to the child of being made legitimate; but then the domicile at the time of the marriage, which gives the status, must be domicile in a country which attributes to marriage that effect" (*n*).

The *domicil* of the *mother* is immaterial.

(*l*) *Re Wright's Trusts* (1856), 25 L. J. Ch. 621; 2 K. & J. 595. In *Munro v. Munro* (1840), 7 Cl. & F. 842, 882, 884, 893, per Lord Brougham, the suggestion was made that the domicile of the father at the time of the marriage alone determined legitimacy in Scots law.

(*m*) *Vaucher v. Solicitor to Treasury, In re Grove* (1888), 40 Ch. D. (C. A.) 216. This case is not, it is true, absolutely decisive, for some of the judges took the view that the father was domiciled in England, both at the time of the child's birth and at the time of his marriage with the child's mother. But the very decided expressions of opinion both by Cotton, L. J. (pp. 231—233), and by Fry, L. J. (p. 241), are nearly equivalent to a decision on the point in question. The same doctrine is laid down in *Udny v. Udny* (1869), 1 Sc. App. 441, 447, per Lord Hatherley; *Goodman v. Goodman* (1862), 3 Giff. 643; *Munro v. Munro* (1840), 7 Cl. & F. 842, 875, per Lord Cottenham.

(*n*) *Ibid.*, p. 233, judgment of Cotton, L. J. Stress is laid in this judgment on the fact that *In re Goodman's Trusts* (1881), 17 Q. B. D. (C. A.) 260, did not decide that legitimation depended on domicile at birth. See *Munro v. Munro* (1840), 7 Cl. & F. 842; *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 448, per Lord Hatherley. Domicil at birth alone is referred to in *In re Andros* (1883), 24 Ch. D. 637, 638.

Thus, where a child's mother was at the time of his birth a domiciled Frenchwoman, it was distinctly laid down that "no importance can be attributed to the fact of the mother being a Frenchwoman. A domiciled Englishman having a child before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicile" (o). So, on the other hand, if the father is a domiciled Scotsman, the child's capacity for being legitimated is not affected by the mother being a domiciled Englishwoman (p).

The *place* of the child's *birth* is immaterial.

It was, indeed, at one time thought that the law of the country *where the child was born* (not of the father's domicile at the time of the birth) determined the effect of the subsequent marriage on the legitimacy of the child (q). It is, however, now settled that the place of the birth is immaterial (r).

The *place* where the *marriage* is *celebrated* is immaterial.

A marriage celebrated in England according to the ritual of the English Church will legitimize the children of a father domiciled in Scotland, both at the time of their birth and at the time of the subsequent marriage in England with their mother (s).

The operation of the principle contained in the rule, under the different circumstances to which it may be applied, may be seen from the following illustrations, in each of which *F* is the father, *M* the mother, and *C* the child. It is assumed in each case that the marriage takes place after *C*'s birth. To understand these examples the reader must bear in mind that Scottish law allows, whilst English law does not allow, *legitimatio per subsequens matrimonium*.

1. *F* and *M* are domiciled in Scotland at the time of *C*'s birth. *C* is born in Scotland. *F* and *M* marry in Scotland whilst domiciled there.

C is legitimate.

(o) *Re Wright's Trusts* (1856), 2 K. & J. 595, 610, per Page Wood, V.-C.

(p) *Munro v. Munro* (1840), 7 Cl. & F. 842. That the domicile of the mother should have no effect is rather remarkable. From the fact that an illegitimate child derives his domicile of origin from his mother (see Rule 6, clause 2, p. 106, *ante*), it might be inferred that his capacity for legitimation would depend on the law of her domicile.

(q) Compare Story, ss. 93 w, 93 s.

(r) *Re Wright's Trusts* (1856), 2 K. & J. 595, 614, judgment of Page Wood, V.-C.; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Udny v. Udny* (1869), L. R. 1 Sc. App. 441.

(s) *Munro v. Munro* (1840), 7 Cl. & F. 842.

2. *F* is domiciled in Scotland but *M* is domiciled in England at the time of *C*'s birth. The birth and the marriage take place in Scotland, *F* being domiciled in Scotland and *M* continuing domiciled in England at the time of the marriage.

C is legitimate.

3. *F* is domiciled in Scotland, but has resided for a long time, and is residing, in England at the time both of *C*'s birth and of the marriage. *M* is an Englishwoman domiciled in England. The marriage takes place in London, according to the ceremonies of the Church of England.

C is legitimate (*t*).

4. *F* and *M* are domiciled in England at the time of *C*'s birth. *C*'s birth takes place in Scotland. *F* and *M* marry in England whilst domiciled there.

C is illegitimate.

5. *F* is domiciled in England, but *M* is domiciled in Scotland at the time of *C*'s birth. The birth and the marriage both take place in England, *F* being domiciled in England and *M* continuing domiciled in Scotland at the time of the marriage.

C is illegitimate.

6. *F* is domiciled in England, but has resided for a long time, and is residing, in Scotland at the time both of *C*'s birth and of the marriage. *M* is an Englishwoman domiciled in England. The marriage takes place in Scotland according to the forms of the Church of Scotland.

C is illegitimate.

7. *F* is domiciled in England, but is residing in Scotland at the time of *C*'s birth. *M* is a Scotswoman domiciled in Scotland. *C* is born in Scotland. After *C*'s birth, but before the marriage with *M*, *F* acquires a Scottish domicile. *F* marries *M* according to the forms of the Church of Scotland whilst domiciled in Scotland.

C is illegitimate (*u*).

8. *F* is domiciled in Scotland at the time of *C*'s birth, but has long resided in England. *M* is an Englishwoman domiciled in England. *C* is born in England. After *C*'s birth, but before the

(*t*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441; *Munro v. Munro* (1840), 7 Cl. & F. 842; *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817. Compare *Shedden v. Patrick* (1854), 1 Macq. 535, 611.

(*u*) This is (substituting Scotland for France) the state of facts decided upon in *Re Wright's Trusts* (1856), 25 L. J. Ch. 621.

marriage with *M*, *F* acquires an English domicil. *F* marries *M* whilst domiciled in England.

C is illegitimate (*v*).

9. *C* is the child of *F* and *M*, both domiciled in Scotland. Before *M*'s death *F* marries another woman, *W*. *W* dies. *F* then marries *M*, the mother of *C*. *C* is thereupon legitimated, but if, during the first marriage with *W*, *X* is born, who is clearly the legitimate son of *F* and *W*, *X*'s rights cannot be damaged by the subsequent marriage of *F* and *M*, and *X* will be treated as the eldest legitimate child of *F*. (*x*).

Proviso. The proviso, that no one born out of lawful wedlock can inherit English real estate, is a strict application of the principle that rights to immovables are governed by the *lex situs*, that is, by the ordinary law of the country where the land is situate (*y*).

The rule of English law is that real property must go to the "heir," and a man must, in order to be an heir, according to English law, fulfil two conditions: First, he must be the eldest living, legitimate son of his father. This condition is fulfilled by a Scotsman who, born of a father domiciled in Scotland, is legitimated by the subsequent marriage of his parents. Secondly, he must be born in lawful wedlock. This condition cannot be fulfilled by a person who is legitimated after his birth. Such a person, therefore, though legitimate, cannot be an English heir, and therefore cannot inherit English land.

On similar grounds he cannot transmit the right to land to his father (*z*), or to collateral relations, since, in order to do this, he must in substance establish the very connection between him and his father which would make him, under different circumstances, heir to his father.

That the want of being born in lawful wedlock, and not illegitimacy on the claimant's part, is the true ground for decision in

(*v*) *Vaucher v. Solicitor to Treasury* (1888), 40 Ch. D. (C. A.) 216.

(*x*) Compare *Kerr v. Martin* (1840), 2 D. 752, where a majority (seven to six) of the full Court, while holding that *C* is legitimated, expressed *obiter* the view adopted above. Compare Fraser, Parent and Child, pp. 41, 42, 45. Legitimation does not make a child born abroad a British subject under Rule 24, p. 176, *ante*. *Shedden v. Patrick* (1854), 1 Macq. 535, 611—614, 623—625, 639—641. Nor can a child be legitimated after its death so that its father can claim damages as a solatium in respect of its death. *McNeill v. McGregor* (1901), 4 F. 123.

(*y*) See chap. xxiii., Rule 150, p. 542, *post*.

(*z*) *Re Don's Estate* (1857), 4 Drew. 194; 27 L. J. Ch. 98.

Birtwhistle v. Vardill (a), is seen from the answer given by the judges to a question submitted to them by the House of Lords. The inquiry made by their Lordships was in substance whether C, who was born before the marriage of his parents, who were domiciled in Scotland, could, in virtue of their subsequent marriage and his legitimation according to Scottish law, be heir to real property in England. Part of the answer was as follows:—

“It appears to us that the answer to the question which your Lordships have put must be founded upon this distinction (b): while we assume that [C] is the eldest legitimate son of his father, in England as well as in Scotland, we think that we have also to consider whether that status, that character, entitles him to the land in dispute as the heir of that father; and we think that this question, inasmuch as it regards real property situated in England, must be decided according to those rules which govern the descent of real property in that country, without the least regard to those rules which govern the descent of real property in Scotland. We have, therefore, considered whether, by the law of England, a man is the heir of English land, merely because he is the eldest legitimate son of his father. We are of opinion that these circumstances are not sufficient of themselves, but that we must look further, and ascertain whether he was born within the state of lawful matrimony; because, by the law of England, that circumstance is essential to heirship; and that is a rule, not of a personal nature, but of that class which, if I (c) may use the expression, is sown in the land, springs out of it, and cannot, according to the law of England, be abrogated or destroyed by any foreign rule or law whatsoever. It is this circumstance which in my opinion dictates the answer which we must give to your Lordships’ question; viz., that, in selecting the heir for English inheritance, we must inquire only who is that heir by the local law” (d).

Limitations to proviso.—First. A person legitimate under Rule 146 in one country is, according to the law of England, legitimate everywhere (e). What the proviso lays down is in effect

(a) (1835), 2 Cl. & F. 571.

(b) I.e., the distinction between “real and personal status” (statutes?).

(c) The opinion of the judges was delivered by Alexander, C. B.

(d) *Birtwhistle v. Vardill* (1835), 2 Cl. & F. 571, 576, 577.

(e) *Re Don’s Estate* (1857), 27 L. J. Ch. 98; 4 Drew. 194. See, especially, judgment of Kindersley, V.-C., 27 L. J. Ch. 100; and *In re Goodman’s Trusts* (1881), 17 Ch. D. (C. A.) 266; *In re Grey’s Trusts*, [1892] 3 Ch. 88; *In re Andros* (1883), 24 Ch. D. 637.

that a person, in order to be an English "heir," must be something more than legitimate. It does not (as it is often supposed to do) lay down that a man may be legitimate, *e.g.*, in Scotland, but illegitimate in England. Thus, in a case with regard to legacy duty, the question arose what duty was payable by the daughters of a British subject domiciled in France, the daughters having been legitimated by the marriage of their parents after their birth. It was held that they were not strangers in blood to their father, and ought to pay only the 1*l.* per cent. duty due from children, and the law was thus stated:—

"If . . . the daughters of the testator are legitimate by the law of France, and must therefore in this country be considered as having the status of children, it is difficult to see how, in any sense, they can be 'strangers in blood.' Where the Legacy Duty Act uses these words, it is as a description of the status of the person.

"In *Birtwhistle v. Vardill* (*f*) it was admitted that the claimant had in England the status of the eldest legitimate son of his father; but inasmuch as he claimed to be heir, and as such entitled to inherit land in England, his status of eldest legitimate son was not enough, and he was held bound to prove that he was 'heir' according to the law of the country in which the land was situated. As he was unable to prove that he was the eldest son of his father born in wedlock, he failed to show that he filled the character of heir, though he did establish his status of eldest legitimate son.

"It is said that the words 'stranger in blood' include the status known to English law as applied to English persons; but this will is that of a domiciled Frenchman, and his status and that of his children must be their status according to the law of France, which, according to *Birtwhistle v. Vardill*, constitutes their English status.

"If, in *Birtwhistle v. Vardill*, the claimant's status was that of eldest legitimate son of his father, it would be absurd to say that he was a stranger in blood.

"The status of these ladies being that of daughters legitimated according to the law of France by a declaration of the father, it is impossible to hold that they are for any purpose strangers in blood, on the mere ground that, if they had been English and

(*f*) (1840), 7 Cl. & F. 895.

"their father domiciled in England, they would have been illegitimate" (g).

Secondly. The proviso is, it will be observed, strictly confined to "real estate," which descends to the heir. It has clearly no application to movables (h); and the principle of the proviso has almost certainly no application to "chattels real" (i), e.g., leases for years, which pass, not to the "heir," but to the personal representative of the deceased.

F, a Scotsman domiciled in Scotland, has, whilst unmarried, a child, C, by M. F afterwards, whilst still domiciled in Scotland, marries M, and after M's death dies intestate, possessed of—

- (a) a freehold estate in England;
- (b) money and furniture situate in England;
- (c) a house in London held on a lease of ninety-nine years (personal estate).

C, the child, *does not* inherit the freehold estate, since he is not F's "heir" according to the law of England (k).

C succeeds to the money, furniture, &c., or the share thereof to which he may be entitled by the law of Scotland (l).

C probably succeeds to the house in London as F's next of kin (m).

Thirdly. The proviso applies in strictness only to the *inheritance* of real estate in the case of *intestacy*; it does not apply to the devolution of English real estate under a will. "The law, as I understand it, is that a bequest of personalty in an English will "to the children of a foreigner means to his legitimate children, "and that by international law, as recognised in this country (n),

(g) *Skottowe v. Young* (1871), L. R. 11 Eq. 474, 477, per Stuart, V.-C.

(h) As to succession to movables, see chap. xxxi., *post*.

(i) See *Freke v. Lord Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123; *Duncan v. Lawson* (1889), 41 Ch. D. 394; *In re Moses*, [1908] 2 Ch. 235.

(k) Rule 146, p. 521, *ante*.

(l) See chap. xxxi., Rule 193, *post*.

(m) See *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541; *Duncan v. Lawson* (1889), 41 Ch. D. 394; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123, compared with *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *In re Grey's Trusts*, [1892] 3 Ch. 88. And see further discussion of the question. One point may be regarded as clear: the domicile of F at his death does not affect one way or another C's right to succeed to F's English leaseholds. (*Duncan v. Lawson*, *supra*.)

(n) *I.e.*; in effect by the principle contained in Rule 146, p. 521, *ante*.

"those children are legitimate whose legitimacy is established by "the law of the father's domicile" (o). This principle, which is really one with regard to the interpretation of a will, is in itself clearly applicable to a devise of English realty and has been so applied. It appears, "upon examination of *Doe v. Vardill* (p) "that the rule there laid down relates only to the case of descent "of land upon an intestacy, and does not affect the case of a devise "in a will to children" (q). Nor does there appear to be any clear reason for applying, in this instance, to a settlement a rule of interpretation different from that applied to a will (r).

Questions suggested by Rule.—The whole Rule, including the proviso, leaves open two questions which cannot be answered with absolute certainty:—

Question 1.—*Can a legitimated person succeed to the English chattels real of an intestate as next of kin under the Statute of Distribution?*

The answer to this question depends on drawing the right inference from the following propositions:—

First. A person born out of lawful wedlock cannot *inherit* English realty as heir (s).

Secondly. Chattels real are not "movables" (t), nor are they "realty"; they are personal estate, and devolve therefore, in case of intestacy, in accordance with the provisions of the Statute of Distribution, and not in accordance with the rules governing the

(o) *In re Andros* (1883), 24 Ch. D. 637, 642, judgment of Kay, J.

(p) (1835), 2 Cl. & F. 571; (1840), 7 Cl. & F. 895.

(q) *In re Grey's Trusts*, [1892] 3 Ch. 88, 93, judgment of Stirling, J.

(r) Though the word "child," or the like, may, when used in an English will or settlement, be held to include any person whom English Courts hold to be legitimate under the rules of private international law recognized by them (*i.e.*, under Rule 146, p. 521, *ante*), yet it must always be remembered that this principle is merely a rule of interpretation, and that the question whether a testator or settlor does or does not mean by the word "child" to designate not only a child born in lawful wedlock, but also a child born out of lawful wedlock whether or not legitimated by the subsequent marriage of his parents, must in every case depend upon the whole tenour of the document. Compare *In re Bleckly, Sidebotham v. Bleckly*, [1920] 1 Ch. (C. A.) 450; *Ebborn v. Fowler*, [1909] 1 Ch. (C. A.) 578. In *Levy v. Solomon* (1877), 25 W. R. 842, children legitimated in the view of Jewish law, but not by English law, were held not to be covered by the term children in a will.

(s) *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895; *Re Don's Estate* (1857), 4 Drew. 194. Compare *In re Grey's Trusts*, [1892] 3 Ch. 88.

(t) *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541.

devolution of movables under the law of the intestate's domicile: thus, if an intestate dies domiciled in Scotland, leaving leaseholds in England, the leaseholds devolve in accordance with the English Statute of Distribution (*u*).

Thirdly. A person who, though born out of lawful wedlock, is legitimated according to the law of his father's domicile, both at the time of such person's birth and at the time of the subsequent marriage (*x*) of his parents, is in England the legitimate child of his father (*y*).

Fourthly. Such a legitimated person is his father's legitimate child under the Statute of Distribution, and as such entitled to succeed as next of kin to his father's goods, though his father dies domiciled in England (*z*).

The right inference from these premises is (it is submitted) that a legitimated person is entitled to succeed to the English chattels real of an intestate as next of kin under the Statute of Distribution, and this whether the domicile of the deceased be foreign or English (*a*).

Question 2.—What is the effect, according to English law, of a person being made legitimate by the authority of a foreign sovereign? (b).

Suppose that a person born illegitimate is legitimated by a decree of the King of Italy, or under an Act of an American State, will such a person be held legitimate here?

(*u*) *Duncan v. Lawson* (1889), 41 Ch. D. 394.

(*x*) See Rule 146, p. 521, *ante*.

(*y*) *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266, 294, 295, judgment of Cotton, L. J.; pp. 298—300, judgment of James, L. J. But compare *In re Fergusson's Will*, [1902] 1 Ch. 483. In this case it was held that the meaning of "next of kin" in an English will was simply a matter of interpretation, and that, though the legatees were Germans domiciled in Germany, this was no ground for interpreting the term "next of kin" in accordance with German rather than English law. It was admitted that the status of such legatees depended on German law.

(*z*) *Ibid.*

(*a*) In an elaborate note on this question (Foote, pp. 221—225) Mr. Foote arrives, on the whole, at the conclusion here put forward as probable, that a legitimated person can succeed as next of kin to English chattels real.

(*b*) See Bar, s. 193, p. 442; Phillimore, s. 542. Compare *In re Ullee* (1886), 54 L. T. (C. A.) 286 (Westlake (5th ed.), p. 109), which, however, is a case depending on the view as to what effect (if any) can be accorded in English Courts to a marriage ceremony entered into in England according to Mahomedan rites between a Mahomedan British subject domiciled in India and a Christian Englishwoman. The view suggested above has authority in the United States; see *Blythe v. Ayres* (1892), 96 Cal. 532, which is really a case on legitimation by recognition by the father without marriage.

There is no English authority on the subject. The most probable answer is (it is conceived) that the effect of such a decree would, like the effect of a subsequent marriage of the parents, depend on the domicile of such person's father at the time of his birth and at the time when the decree was issued. Suppose, that is to say, that the child's father were domiciled in Italy at the time of the child's birth and at the date of the decree, then the decree would have the effect of making the child legitimate in England. If, on the other hand, the father were domiciled in England, either at the time of the birth or at the date of the decree, the child would apparently not be legitimated in England thereby.

(E) LUNATIC AND CURATOR, OR COMMITTEE.

RULE 147 (c).—(1) The powers and authorities conferred by the Lunacy Act, 1890, upon the Judge in Lunacy (*d*) in respect of the management and administration of the property of a lunatic extend to the lunatic's property of whatever kind situate in any British possession.

(2) The powers of management and administration of the estate of a lunatic so found by inquisition in England, vested in the Judge in Lunacy and the Committee of the lunatic's estate, extend to the personal property in Ireland of the lunatic, provided it does not exceed 2,000*l.* in value or the income thereof does not exceed 100*l.* a year, and similar provisions apply to the personal property in England of lunatics so found on inquisition in Ireland.

(3) The powers of management and administration conferred in England with regard to cases in which the property of a person of unsound mind does not exceed 2,000*l.* in value or the income 100*l.* a year, and the like

(c) See the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 131. For the powers referred to, see also 8 Edw. 7, c. 47. See also Ord. XI. r. 8a (b).

(d) For the definition of this expression, see the Lunacy Act, 1890, s. 108; Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27, sub-s. (1); and Lunacy Act, 1911 (1 & 2 Geo. 5, c. 40), s. 1.

powers conferred in Ireland extend to the property in Ireland or England, as the case may be, of the person of unsound mind if the total of his property in both countries does not exceed 2,000*l.* or the income does not exceed 100*l.*

(4) The Committee of the estate of a person found lunatic by inquisition in England has the same powers with regard to the lunatic's personal property in Scotland as a tutor at law after cognition or a *curator bonis* to a person of unsound mind in Scotland (*e*), and a tutor at law or *curator bonis* duly appointed in Scotland has the same powers with respect to the lunatic's personal property in England as a committee of the estate of a lunatic so found by inquisition.

Comment.

This Rule represents the statutory provisions enacted by the Lunacy Act, 1890, to simplify the administration in the United Kingdom of the property of a lunatic. The same Act (*f*) makes provision to secure the restoration to authorized custody in the United Kingdom of any lunatic who escapes.

It will be noted that the Judge in Lunacy is given an extremely wide power with regard to the property of a lunatic situate in any British possession, *i.e.*, any part of the British dominions outside the United Kingdom.

RULE 148.—A person appointed by a foreign decree or commission the curator or committee of a lunatic resident in a foreign country (hereinafter called a foreign curator) does not acquire the right as such curator to control the person of the lunatic in England (*g*), though, in a proper case, on application to the Judge in Lunacy arrangements may be made for the handing over of the lunatic to the foreign curator (*h*).

(*e*) *Grant v. Rose* (1835), 13 S. 878; *Gordon v. Stair*, 13 S. 1073.

(*f*) Ss. 86—89.

(*g*) *In re Houston* (1826), 1 Russ. 312, per Eldon, C.

(*h*) *In re Sottomaior* (1874), L. R. 9 Ch. 677, 679; *In re Burbidge*, [1902] 1 Ch. (C. A.) 426. A simple means of procedure is provided by the Lunacy

Comment.

The control of lunatics is essentially bound up with the question of the liberty of the subject, and it is obviously impossible that a foreign curator should be permitted on the strength of a foreign decree to exercise restraint over a lunatic in England. On the other hand, in a suitable case the Judge in Lunacy may permit the handing over of a lunatic resident in England to a foreign curator appointed under the law of the lunatic's domicile. Thus where a gentleman was domiciled and had most of his property in Portugal, but was resident in England, being confined there as a lunatic so found by inquisition, and his wife had taken proceedings in lunacy in Portugal, under the law of which country she was the guardian and the administratrix of his estate, permission was given for the removal of the lunatic by the committee for delivery to his wife's custody, his moneys in England being also paid over to her.

RULE 148 A.—(1) The foreign curator of a lunatic may, at the discretion of the Court, enforce by action claims in respect of movable property of the lunatic in England.

(2) The foreign curator of a lunatic resident out of England may at the discretion of the Judge in Lunacy secure the transfer to himself of stock standing in the name of or vested in the lunatic.

Comment.

(1) The older rule (*i*) appears to have been to treat the position of a foreign curator with regard to the property in England of a lunatic as on the same footing as his control of the person of the lunatic, but this tendency obviously rests on no sound basis, and as early as 1855 it was decided that a Scottish *curator bonis* of a person of unsound mind in Scotland could sue in England for money due to the lunatic and give a good discharge for it (*k*).

Act, 1890, s. 71. As regards the effect in this country of proceedings in India, see the Lunatics Removal (India) Act, 1851 (14 & 15 Vict. c. 81).

(*i*) *In re Houston* (1826), 1 Russ. 312.

(*k*) *Scott v. Bentley* (1855), 1 K. & J. 281, 284, per Page Wood, V.-C. Compare *Hessing v. Sutherland* (1856), 25 L. J. Ch. 687; *Newton v. Manning* (1849), 1 Mac. & G. 362. See also Judicial Factors Act, 1889 (52 & 53 Vict. c. 39), s. 13.

This case has often been followed since (*l*), but the right of the foreign curator appears to be subject to the discretion of the Court in every case in which the property is in the custody of the Court or can be reached only in virtue of the Court's jurisdiction as to trust property (*m*), or the lunatic is domiciled in England (*n*).

Further, it must be noted that if the lunatic is in England even temporarily an English committee may always be appointed for his estate, and that, if this is done, all power to deal with the estate is vested in that committee alone (*o*). Even if the lunatic is not in England, a committee may in a suitable case be appointed (*p*), with the result of ousting the foreign curator from any right to deal with the property of the lunatic.

Moreover, no foreign curator as such has any authority with regard to English immovables belonging to the lunatic (*q*).

(2) The jurisdiction in this part of the Rule is purely statutory, and is exercised under the Lunacy Act, 1890, s. 134. The section runs (except as to the words in brackets) in the following terms:—

“Where any stock is standing in the name of or vested in a

(*l*) *In re Baker* (1871), L. R. 13 Eq. 168; *In re De Linden*, [1897] 1 Ch. 453; *Thiery v. Chalmers, Guthrie & Co.*, [1900] 1 Ch. 80; *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. 15; *Pélégriin v. Coutts & Co.*, [1915] 1 Ch. 696. Contrast *In re Barlow's Will* (1887), 36 Ch. D. (C. A.) 287, where payment of a fund in the hands of trustees was not ordered by the Court, apparently on the ground that the patient had not been found a lunatic, and that her property was not vested by the foreign law (that of New South Wales) in the curator.

(*m*) *In re Garnier* (1872), L. R. 13 Eq. 532. See also 35 & 36 Vict. c. 44; *In re Carr's Trusts*, [1904] 1 Ch. (C. A.) 792.

(*n*) *New York Security Co. v. Keyser*, [1901] 1 Ch. 666, where it was held that the foreign committee of a man domiciled in England, though resident in a foreign country where he is found lunatic, cannot as of right recover the lunatic's movable property in England. Where, however, the lunatic is domiciled and resident abroad, the Court has only to satisfy itself of the title of the lunatic and the authority of the curator. See *Didisheim v. London and Westminster Bank*, [1900] 2 Ch. (C. A.) 15, 50—52, judgment of Lindley, L. J. In a case falling within the principle thus laid down, a bank is not entitled to demand that an order be obtained from the Court, and may be condemned in expenses. *Pélégriin v. Coutts & Co.*, [1915] 1 Ch. 696.

(*o*) *In re R. S. A.*, [1901] 2 K. B. 32; *In re Burbidge*, [1902] 1 Ch. 426; *In re Soltzkoff*, [1898] W. N. 77. Compare *In re Knight*, [1898] 1 Ch. (C. A.) 257, 260, 261, per Lindley, M. R.

(*p*) Lunacy Act, 1890, s. 96; Heywood & Massey, Lunacy Practice, pp. 3, 235.

(*q*) *Grimwood v. Bartels* (1877), 46 L. J. Ch. 788; the proceeds of land belonging to a Chilian lunatic, sold under the Partition Act, 1868 (31 & 32 Vict. c. 40), are not payable to his Chilian curator *ad bona*, who, however, may receive the interest. The circumstances of the case were very unusual.

“person residing out of [England (*r*)], the Judge in Lunacy, upon
 “proof to his satisfaction that the person has been declared
 “lunatic, and that his personal estate has been vested in a person
 “appointed for the management thereof [*i.e.*, a foreign cura-
 “tor (*s*)], according to the law of the place where he is residing,
 “may [in its discretion (*t*)] order some fit person to make such
 “transfer of the stock or any part thereof to or into the name of
 “the person so appointed [*i.e.*, the foreign curator (*s*)] or other-
 “wise, and also to receive and pay over the dividends thereof, as
 “the judge thinks fit.”

As to this enactment, the following points are noticeable:—

The power of the Court (*u*) is, as to cases within this section, in the strictest sense discretionary; whilst the Court cannot act under the enactment in any case in which its requirements are not complied with, a foreign curator cannot, because its requirements are complied with, claim as of right that the Court should act under it. To which may be added that, provided the lunatic is resident out of England, the Court's power under this section in no sense depends upon his domicile.

The term “stock” is used in a very wide sense (*x*).

The word “vested,” in regard to the curator, is also used in a wide sense, and includes the right to obtain and deal with, without being actual owner of, the lunatic's personal estate.

The following are illustrations of the operation of the enactment:—

A Spaniard, born in Spain, has acquired a domicile and is domiciled in New York. He resides, and has for many years resided, in France. He is declared lunatic by a French Court. A French curator is appointed. An application is made by the curator for an order transferring securities of the lunatic to the French curator. The order is, as a matter of discretion, granted (*y*).

(*r*) “England” substituted for “the jurisdiction of the High Court.”

(*s*) Added for the sake of elucidation.

(*t*) These words give the effect of *In re Knight*, [1898] 1 Ch. (C. A.) 257, 260, 261.

(*u*) See Heywood & Massey, pp. 264—268.

(*x*) “Stock includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854 [now the Merchant Shipping Act, 1894]”: Lunacy Act, 1890 (53 Vict. c. 5), s. 341.

(*y*) *In re De Larragoiti*, [1907] 2 Ch. (C. A.) 14.

A lady residing in Victoria is declared lunatic by the Supreme Court sitting in Lunacy, and the Master in Lunacy is appointed to manage her property, which consists of English stock standing in her name. The English Court is petitioned on behalf of the Master to transfer such stock into his name. The word "vested" in sect. 134 includes the right to obtain and deal with a lunatic's personal estate without being actual owner thereof. The Court in its discretion orders the transfer of the stock into the name of the Victorian Master in Lunacy (z).

(z) *In re Brown*, [1895] 2 Ch. (C. A.) 666. Compare *In re Knight*, [1898] 1 Ch. (C. A.) 257.

CHAPTER XXII.

NATURE OF PROPERTY (*a*).

RULE 149 (*b*).—The law of a country where a thing is situate (*lex situs*) determines whether

- (1) the thing itself, or
- (2) any right, obligation, or document connected with the thing,

is to be considered an immovable or a movable.

Comment.

Whether a given thing is in its nature a movable or an immovable, *i.e.*, whether it can in fact be moved or not, is manifestly a matter quite independent of any legal rule. A law, however, may determine that a thing in its nature movable shall, for some or for all legal purposes, be subject to the rules generally applicable to immovables, or that a thing in its nature immovable shall, for some or all legal purposes, be subject to the rules applicable to movables. In this sense, and in this sense alone, law can determine whether a given thing shall be treated as a movable or as an immovable. Thus, the law of England can determine, as in fact it does, that title deeds shall be considered as part of the real estate, and descend to the heir, or, in other words, that title deeds shall in some respects be considered or treated as immovables. The only law which can effectively determine whether subjects of property shall be treated as movables or immovables is the law of the country where a given piece of property is in fact situate. Law, as already pointed out, deals in reality with rights; and the law of

(*a*) Story, s. 447. Compare for different views on the subject, Bar (Gillespie's transl., 2nd ed.), s. 229, p. 505.

(*b*) *Chatfield v. Berchtoldt* (1872), L. R. 7 Ch. 192; *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *Ex parte Rucker* (1834), 3 Dea. & Ch. 704; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123; *Duncan v. Lawson* (1889), 41 Ch. D. 394; *Monteith v. Monteith's Trustees* (1882), 9 R. 982, Ct. of Sess.; *In re Lyne's Settlement Trusts*, [1919] 1 Ch. (C. A.) 80.

the country where a given tangible thing is in fact located can determine whether the rights over such thing, *e.g.*, land, or obligations connected with it, or the documents which embody such rights or obligations, shall be treated as movables or immovables. Thus, title deeds, as already pointed out, are in their nature movables, but title deeds in regard to land in England are treated as appurtenant to the land to which they belong. So a rent-charge on lands in England *pur autre vie* is for some purposes made personal estate by English law without being strictly treated as a movable (*c*). And English Courts admit the right of other countries to determine whether property within their limits comes within the class of movables or immovables. When slavery existed in Jamaica, the slaves on the estate were reckoned appurtenant to the land, and have been held by our Courts to pass under a devise of realty in Jamaica (*d*). Heritable bonds (*e*), again, in so far as they are treated by the law of Scotland as realty or immovables, are recognized as immovables by English Courts (*f*). The last example is specially noticeable in relation to our Rule; it shows that it is the *lex situs* which determines not only the nature of a thing, but also of rights, obligations, or documents connected with a thing. A heritable bond may itself be deposited in a bank in England, but it is Scottish law—the *lex situs* of the land on which the bond imposes a charge—that determines the character of the bond. If this be borne in mind, the language of Story, which, if carelessly read, might be misunderstood, gives a correct view of the case. “In addition,” he writes, “to these [*i.e.*, lands, “houses, &c.], which may be deemed universally to partake of “the nature of immovables, or (as the common-law phrase is) to “savour of the realty, all other things, though movable in their

(*c*) *Chatfield v. Berchtoldt* (1872), L. R. 7 Ch. 192.

(*d*) *Ex parte Rucker* (1834), 3 Dea. & Ch. 704.

(*e*) “A ‘heritable bond’ is a bond for a sum of money, to which is joined, “for the creditor’s further security, a conveyance of land or of heritage, to be “held by the creditor in security of the debt.” See “Heritable Bond,” Bell’s Dictionary of the Law of Scotland (ed. of 1882). See, however, the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117, whereby heritable bonds are now made, for certain purposes, part of movable estate.

(*f*) *In re Fitzgerald*, [1904] 1 Ch. (C. A.) 573; *Johnstone v. Baker* (1817), 4 Madd. 474, n.; *Jerningham v. Herbert* (1829), 4 Russ. 388, 395; *Allen v. Anderson* (1846), 5 Hare, 163.

So, if a debt secured by a mortgage of land in a foreign country is, under the law of that country, an immovable, it should (*semble*) be treated as an immovable by English Courts. See *Lawson v. Commissioners of Inland Revenue*, [1896] 2 Ir. R. 418, 434, 435; [1896] W. N. 145, 148, judgment of Palles, C. B.

“nature, which by the local law are deemed immovables, are in like manner governed by the local law. For every nation having authority to prescribe rules for the disposition and arrangement of all the property within its own territory, may impress upon it any character which it shall choose; and no other nation can impugn or vary that character. So that the question, in all these cases, is not so much what are, or ought to be deemed *ex suâ naturâ*, movables or not, as what are deemed so by the law of the place where they are situated. If they are there deemed part of the land, or annexed (as the common law would say) to the soil or freehold, they must be so treated in every place in which any controversy shall arise respecting their nature and character. In other words, in order to ascertain what is immovable or real property or not, we must resort to the *lex loci rei sitæ*” (g). And the principle conversely applies to immovables which, by the *lex situs*, are treated as movables (h).

(g) Story, s. 447; *Chapman v. Robertson*, 6 Paige (N. Y.) 630. See *Murray v. Champernowne*, [1901] 2 Ir. R. 232; *In re Hoyles*, [1911] 1 Ch. (C. A.) 179; *Forbes v. Adams* (1839), 9 Sim. 462.

(h) As to the treatment of the proceeds of immovables as movables, see *Forbes v. Steven* (1870), L. R. 10 Eq. 178; *In re Stokes* (1890), 62 L. T. 176; *In re Piercy*, [1895] 1 Ch. 83; *In re Lyne's Settlement Trusts*, [1919] 1 Ch. (C. A.) 80. Contrast p. 536, note (q).

CHAPTER XXIII.

IMMOVABLES (*a*).

RULE 150 (*a*).—All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (*lex situs*).

Comment.

“The general principle of the common law is, that the laws of “the place, where such [immovable] property is situate, exclusively “govern, in respect to the rights of the parties, the modes of “transfer, and the solemnities which should accompany them” (*b*). “The common law has avoided all . . . difficulties by a simple “and uniform test. It declares that the law of the *situs* shall “exclusively govern in regard to all rights, interests, and titles, in “and to immovable property. Of course it cuts down all attempts “to introduce all foreign laws, whether they respect persons or “things, or give or withhold the capacity to acquire or to dispose “of immovable property” (*c*). “All questions concerning the “property in immovables, including the forms of conveying them, “are decided by the *lex situs*” (*d*). The general principle thus enunciated by Story and by Westlake is beyond dispute, and applies to rights of every description (*e*).

(*a*) Story, chap. x., ss. 424—463 a; Westlake (5th ed.), chap. viii., ss. 156—179, pp. 220—236; Foote (4th ed.), chap. vi., pp. 194—225; *In re Estate of Von Brentano*, [1911] P. 172; *In re Miller*, [1914] 1 Ch. 511; *In re Hoyles*, [1911] 1 Ch. (C. A.) 179; *In re Charteris*, [1917] 2 Ch. 257.

As to jurisdiction in respect to immovables, see Rule 53, p. 223, *ante*, Rule 93, p. 389, *ante*, and Rule 97, p. 413, *ante*.

(*b*) Story, s. 424. Story's statements with regard to the rules of the common law as regards the conflict of laws may be considered to some extent authoritative.

(*c*) Story, s. 463.

(*d*) Westlake, s. 156, p. 221.

(*e*) As English Courts have in general no jurisdiction to adjudicate upon the title to or the right to the possession of foreign land (see Rule 53, p. 223, *ante*),

Rule 150 applies in principle not only to English, but also to foreign, immovables (land), in so far as it may happen (which is not often the case (*f*)) that English Courts are called upon to determine rights over foreign land, or (what is more likely) of money in England which represents foreign land. Their decision must be governed by the *lex situs*—i.e., the law of the country (*e.g.*, France) where the land is situate. But it must be remembered that in this Digest the *lex situs*, or law of France, means not necessarily the territorial law of France, but any law which the French Courts would apply to the decision of the particular case (*g*), which might under certain circumstances be the local law of some other country, *e.g.*, of England (*h*). In truth an English Court in the rare cases when it determines rights in respect of foreign land follows the *lex situs* almost of necessity. The sovereign of the country where land is situate has absolute control over the land within his dominions: he alone can bestow effective rights over it; his Courts alone are, as a rule, entitled to exercise jurisdiction over such land. If English Courts were to determine rights to land, *e.g.*, in Italy, by any other law than the *lex situs*, our tribunals would, in the first place, be guilty of an indirect encroachment upon the rights of the sovereign of Italy over Italian land (*i*), and would, in the second place, often be guilty of a refusal to recognize rights duly acquired under the law of a foreign country (*k*).

Capacity (l).—Hence a person's *capacity* to alienate an immovable *inter vivos* (*m*), or to devise (*n*) an immovable, or to

the cases with regard to land which come before them must in general have reference to land in England. But this is not invariably the case. (See p. 225, *ante*.)

(*f*) See Rule 53, p. 223, *ante*.

(*g*) See pp. 69, 79—81, especially p. 81, note (*x*), *ante*.

(*h*) See Sewell, *Outline of French Law as affecting British Subjects* (1897), p. 113; and Vincent, *Dict. du Droit Int. Privé*, p. 289.

(*i*) See General Principle No. II. (C.), p. 34, *ante*.

(*k*) See General Principle No. I., p. 23, *ante*. It should be remembered that marriage, even where there is a marriage contract, is often, as between husband and wife, an assignment of property, and an assignment of land is always subject to the *lex situs*.

(*l*) See Illustrations 1—4, p. 549, *post*, and *Bank of Africa, Ltd. v. Cohen*, [1909] 2 Ch. (C. A.) 129. This case, however, rather turns on form than capacity.

(*m*) Story, ss. 431—463. Compare Nelson, p. 147; and see *Sell v. Miller*, 14 Iowa, N. S. 331 (Am.).

(*n*) *Ibid.* Compare *In re Hernando* (1884), 27 Ch. D. 284.

acquire or to succeed (o) to an immovable, is governed by the *lex situs* (p).

"If a person is incapable, from any . . . circumstance, of transferring his immovable property by the law of the *situs*, his transfer will be held invalid, although by the law of his domicile no such personal incapacity exists. On the other hand, if he has capacity to transfer by the law of the *situs*, he may make a valid title, notwithstanding an incapacity may attach to him by the law of his domicile. This is the silent but irresistible result of the principle adopted by the common law, which has no admitted exception" (q).

"It may be laid down as a general principle of the common law, that a party must have a capacity to take according to the law of the *situs*; otherwise he will be excluded from all ownership. Thus, if the laws of a country exclude aliens from holding lands, either by succession, or by purchase, or by devise, such a title becomes wholly inoperative as to them, whatever may be the law of the place of their domicile. On the other hand, if by the local law aliens may take and hold lands, it is wholly immaterial what may be the law of their own domicile, either of origin or of choice" (r).

Rights and Formalities of Alienation and of Contract (s).—So, again, the *right to alienate* an immovable, the *modes and formalities* (t) and the *effects* (u) of alienation of an immovable *inter vivos*, and the restrictions (if any) imposed upon such alienation, are governed by the *lex situs*. So also, on one view, are the formalities requisite for any mere *contract* with regard to an immovable. On this last point it is necessary to speak with considerable

(o) *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895; *Re Don's Estate* (1857), 4 Drew. 194; *Fenton v. Livingstone* (1859), 3 Macq. 497; *Duncan v. Lawson* (1889), 41 Ch. D. 394.

(p) As regards contracts, capacity is presumably governed by the *lex situs* or *lex loci contractus*, according to the nature of the contract. See the discussion as to formalities, p. 545, *post*.

(q) Story, s. 431.

(r) Story, s. 430.

(s) See Illustrations 5—9, pp. 549, 550, *post*.

(t) Story, s. 424; *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403; *In re Hernando* (1884), 27 Ch. D. 284. Compare *Bank of Africa v. Cohen*, [1909] 2 Ch. (C. A.) 129 (mortgage by woman of land in South Africa).

(u) *Hicks v. Powell* (1869), L. R. 4 Ch. 671; *Norton v. Florence, &c. Co.* (1877), 7 Ch. D. 332.

hesitation. The language of authors such as Westlake or Story (*x*) certainly suggests that every question with regard to an immovable, and therefore the formal validity of a contract having reference to land, is governed by the *lex situs*. No reported case, moreover, it is submitted, contradicts this conclusion, and *Adams v. Clutterbuck* (*y*) is in its favour.

But the expressions of Westlake and Story will be found, when carefully examined, to apply to forms of *alienation or conveyance*, and do not of necessity apply to the form of a *contract*. The doctrine, moreover, of both these writers, that the formal validity of a contract is determined by the law of the country where a contract is made (*lex loci contractus*), is stated in terms broad enough to cover (*z*) a contract in relation to immovables or land, whilst *Adams v. Clutterbuck* (*a*) relates to a conveyance or alienation of land, or at any rate to a contract forming part of a conveyance.

Here we reach the root of the difficulty. Contracts with regard to land usually form part of an instrument which is meant to convey or alienate land or an interest in land, but the form of such an instrument is admittedly determined by the law of the country where the land is situate (*lex situs*). The question, therefore, whether a contract with regard to an immovable is or is not, as to its form, governed by the *lex situs*, can arise only when the contract is not intended to be a conveyance or alienation of the land; as, for example, where *X* agrees in England with *A* that he will, six months after the date of the agreement, hire a house in Paris for *A*, or where *X* agrees with *A* in France that he will, six months after the date of the agreement, let a music hall in London to *A*. In these and similar instances there is an agreement to let land and not a conveyance of it, and the question may arise whether the form of the contract is governed by the *lex situs* or the *lex loci contractus*. The answer to the inquiry cannot be treated as certain; the better opinion, however, clearly is that the formalities of such a contract with regard to immovables are governed by the *lex loci contractus*, as must inevitably be the case in those contracts which create an equitable mortgage over foreign

(*x*) See p. 542, *ante*.

(*y*) 10 Q. B. D. 403.

(*z*) Story, ss. 242—260; Westlake (5th ed.), ss. 207—210, pp. 295—298; Foote (4th ed.), p. 354.

(*a*) 10 Q. B. D. 403.

land where the *lex situs* (b) does not recognize such forms of mortgage (c).

Marriage as an Assignment of Foreign Immovables (d).—The effect of marriage on the mutual rights of husband and wife with regard to any *foreign* immovable, *i.e.*, any land situate out of England, is (in so far as the determination of such rights can fall within the jurisdiction of an English Court) governed by the *lex situs* in the sense in which that term is used in this Digest (e).

Where there is a Marriage Contract or Settlement.—The Courts of any country (*e.g.*, France) where land is situate will probably wish to give effect to the marriage contract or settlement, but it is for the Courts, or law, of the *situs* to decide what is the proper law of the marriage contract, and whether provisions allowed by that law are or are not prohibited by the local or territorial law (*e.g.*, of France) in respect of French land.

English Courts, if called upon to determine directly or indirectly the effect of a marriage contract on rights to French land, will attempt to decide the matter as a French Court would decide it, *i.e.*, will follow the *lex situs* (f).

Where there is no Marriage Contract or Settlement.—Here, again, English Courts, if called upon to determine the effect of a marriage on the mutual rights of husband and wife (*e.g.*, to French land) will attempt to decide the matter as a French Court would decide it, and will follow the *lex situs*.

(b) See App., Note 20, "Law governing Contracts with regard to Immovables." The question cannot really be raised in England with regard to contracts within the fourth section of the Statute of Frauds, for that enactment, it has been decided, applies to procedure. *Leroux v. Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1. Hence a contract with regard to an interest in land cannot be enforced in England unless there is a proper note or memorandum thereof in writing, and this quite independently of the influence of the *lex situs*. See as to procedure, chap. xxxii., *post*.

(c) *Ex parte Pollard* (1840), Mont. & Ch. 239, 256; 4 Deacon, 27; *In re Smith*, [1916] 2 Ch. 206.

(d) See Illustrations 10, 11, pp. 550, 551, *post*. As to the law governing the effect on *English* immovables or lands, see Exception 2, pp. 553—556, *post*. For a statutory affirmation of this principle as regards heritable estate in Scotland, see the Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. 5, c. 64), s. 7.

(e) See pp. 69, 79—81, especially p. 81, note (x).

(f) *In re Pearce's Settlement*, [1909] 1 Ch. 304, in which a contract to settle property acquired after marriage was held not to include freehold land in Jersey, where the *lex situs* does not permit of such a settlement.

Devolution (g).—Every question with regard to the devolution of immovables, or land, in consequence of death is (subject, of course, to the exceptions hereinafter mentioned) governed by the *lex situs*. And this is so whether the devolution takes place under an intestacy or under a will, and whether the immovables be real property or personal property.

The result, as regards the devolution of a deceased person's English immovables or land (which may be either real or personal property (*h*)), is as follows:—

The deceased's immovables (whether real property or personal property (*i*)) pass on his death to his personal representative (*k*) for administration.

The beneficial succession to such immovables depends on the nature of the property.

On the estate being cleared, the deceased's real property descends, if he dies intestate, to his heir, or if he dies having made a valid will (*l*), to the devisee; the deceased's chattels real, *e.g.*, leaseholds, being personal property, must be distributed without any reference to the deceased's *lex domicilii*, if the deceased dies intestate, in accordance with the Statute of Distribution (*lex situs*), or, if the deceased dies having made a valid will, then in accordance with the terms of his will. In other words, the beneficial succession to the deceased's immovable property is governed by the *lex situs* applicable to the particular kind of immovables (*m*).

The formalities required for the devise of immovables, whether realty or personalty, the restrictions (if any) on such devise or bequest, and generally the validity of a will of lands, are wholly governed by the ordinary testamentary law of England (*lex situs*).

The devolution of immovables situate in a foreign country, *i.e.*, foreign land, or of money representing such immovables, is

(*g*) See Illustrations 12—17, pp. 551, 552, *post*. *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. R. 9 Eq. 541; *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123; *Coppin v. Coppin* (1725), 2 P. Wms. 290; *Balfour v. Scott* (1793), 6 Bro. P. C. 550; *Drummond v. Drummond* (1799), 6 Bro. P. C. 601.

(*h*) See pp. 75—77, 335, *ante*.

(*i*) See the Land Transfer Act, 1897, s. 2.

(*k*) See p. 335, *ante*.

(*l*) The will must be in the form prescribed by the Wills Act, 1837; for a curious case of the validity of a secret Chilian will, the cover of which only was signed by the testator and the witnesses, see *In re Nicholls*, [1921] 2 Ch. 11, following *In Goods of Almosmino* (1859), 29 L. J. P. & M. 46.

(*m*) *Duncan v. Lawson* (1889), 41 Ch. D. 394.

determined, in so far as the matter can be dealt with by English Courts, in accordance with the *lex situs* or law of such foreign country in the sense in which the term is used in this Digest (*n*).

Guardianship, Curatorship, &c. (*o*).—The appointment of a guardian or an assignee in bankruptcy under the law of a foreign country does not operate as an assignment to such guardian, &c. of any immovable in England (*p*).

Prescription (*q*).—The question whether the possessor or occupier of an immovable or land has or has not acquired a title thereto by lapse of time, *i.e.*, by prescription (*r*), is to be determined in accordance with the *lex situs*, and this is so whether the land is situate in England or in a foreign country, *e.g.*, France (*s*).

Difficulties in application of Rule.—The principle that rights over land are governed by the *lex situs* is thoroughly well established. The application, however, of the principle may sometimes give rise to difficulty. It may be hard to determine how far a particular provision of the *lex situs* is in strictness a provision having reference to rights over land (*t*). It may also not be easy to determine whether, and to what extent, the rights affected by a given transaction are rights over land (*u*).

(*n*) See pp. 79—81, *ante*. This is approved in *Murray v. Champernowna*, [1901] 2 Ir. R. 232, 236 (Andrews, J.). Compare *In re Hoyles*, [1911] 1 Ch. (C. A.) 179; *In re Rea*, [1902] 1 Ir. R. 451 (land in Victoria); *In re Piercy*, [1895] 1 Ch. 83. In *Hanson v. Walker* (1829), 7 L. J. Ch. 135, the produce of foreign land belonging to a testator domiciled in England was distributed to creditors in the order of priority under the *lex situs*. See also *Nelson v. Bridport* (1845), 8 Beav. 527.

(*o*) See Illustrations 18, 19, pp. 552, 553, *post*.

(*p*) See Westlake, s. 166, p. 225, and p. 536, *ante*.

(*q*) See Illustration 20, p. 553, *post*.

(*r*) *Beckford v. Wade* (1805), 17 Ves. 87; *Hicks v. Powell* (1869), L. R. 4 Ch. 741; *Re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt v. Dacre* (1876), 3 Ch. D. 295. Compare Westlake (5th ed.), s. 171; Foote (4th ed.), pp. 197—200.

(*s*) See, however, as to the limitation to an action, and with regard to an immovable, Exception 5, p. 557, *post*.

(*t*) See, *e.g.*, as to the Mortmain Act, 1888, s. 4, *Mayor of Canterbury v. Wyburn*, [1895] A. C. 89; *Attorney-General v. Mill* (1831), 5 Bli. 593; 2 Dow & Cl. 393; *Attorney-General v. Stewart* (1817), 2 Mer. 143.

The applicability to a will of English land of the rule that marriage is a revocation thereof (Wills Act, 1837, s. 18) may well appear to depend upon the *lex situs*, but the matter is (*semble*) governed by the law to which husband and wife become subject at the time of the marriage, *i.e.*, generally speaking, the law of the matrimonial domicile. See *In re Martin*, *Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 240, judgment of Vaughan Williams, L. J.

(*u*) See *In re Piercy*, [1895] 1 Ch. 83. Compare *In re Rea*, [1902] 1 Ir. R. 451.

Illustrations.

1. A French subject domiciled in France is 20 years of age, and owns freehold land in England. He is under English law a minor. He conveys the land to a purchaser. The effect of his minority on the validity of the conveyance is governed wholly by the law of England (*x*).

2. A man of 22 is the citizen of a foreign country where he is domiciled, and under the law of which he is a minor. He owns freehold land in England. He is under English law an adult. His capacity to convey land is unaffected by the fact that he is a minor by the law of his foreign domicile (*y*).

3. A foreign corporation is formed under the law of New York for the purchase of land, and with a right under the law of New York to hold land. The capacity of the corporation to hold land in England is governed by the law of England (*z*).

4. X, a domiciled Scotsman born out of lawful wedlock, is legitimated, according to Scottish law, by the marriage of his parents after his birth. His father is possessed of freeholds in England and dies intestate. X's capacity to inherit real estate in England is governed by the law of England, and he cannot acquire the freeholds by inheritance (*a*).

5. A domiciled Frenchman is tenant for life of freeholds in England. His right to deal with the freeholds is governed wholly by the law of England (*b*).

6. M agrees to purchase land in Demerara of N, borrows money of A in England for the purchase, and agrees in England to secure the money by a mortgage of the land. The land is not properly conveyed to A according to the formalities required by the law of Demerara. M becomes bankrupt. X, M's assignee, completes the purchase of the land from N, sells it, and receives the purchase-money. Whether A has an equitable right to the

(*x*) See Story, s. 431.

(*y*) *Ibid.* Compare *In re Hernando* (1884), 27 Ch. D. 284, as to the right of an Englishwoman married to a Spaniard to dispose by will of English leaseholds without regard to limitations under Spanish law on her testamentary capacity, her power of disposal depending on a marriage settlement. Compare Exception 2, p. 553, *post*.

(*z*) See as to corporations, chap. xx., *ante*.

(*a*) See Rule 146, p. 521, *ante*; *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895; *Fenton v. Livingstone* (1859), 3 Macq. 497. Note that *Birtwhistle v. Vardill* has no reference to taking land otherwise than by descent. *In re Grey's Trusts*, [1892] 3 Ch. 88.

(*b*) See p. 544, *ante*.

purchase-money depends on the law of Demerara (*lex situs*), not of England (*c*).

7. A domiciled Frenchman disposes of freehold land in England. The proper form of conveyance is determined by the law of England (*d*).

8. A domiciled Englishman conveys to a purchaser domiciled in England a right of shooting over lands in Scotland. The conveyance is made by an instrument in writing, but not under seal. The law of England does, but the law of Scotland does not, require such a conveyance to be under seal. The conveyance is valid, *i.e.*, the forms required are determined by the law of Scotland (*e*).

9. A domiciled Scotsman conveys to a purchaser, who is also a domiciled Scotsman, the right of shooting over land in England. The conveyance is made by an instrument not under seal. The conveyance is invalid, not being in accordance with the law of England (*lex situs*) (*f*).

10. *H*, an Englishman, domiciled in England, marries *W*, a Frenchwoman domiciled in France. There is no marriage settlement. *H*, after his marriage, purchases French land. On his death, the rights (if any) of *W* in respect of *H*'s land in France are, according to the law of France (*lex situs*), governed by the ordinary law of England (*g*), except that the right to dower, as being contrary to French public policy, is not recognized by French law in respect of French lands (*h*). On the death of *H*, *W* has no right (*i*) to "community" in the French land, nor to dower.

11. *H*, a Frenchman domiciled in France, marries *W*, a Frenchwoman, domiciled in France. The parties marry under the system of community. *H*, after his marriage, purchases leaseholds in Massachusetts. According to the law of Massachusetts (*lex situs*) the rights of a married woman, wherever domiciled, in respect of land in Massachusetts, are (*semble*) governed by the

(*c*) *Waterhouse v. Stansfield* (1851), 9 Hare, 234; (1852), 10 Hare, 254.

(*d*) As to formalities of alienation, see p. 544, *ante*.

(*e*) *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

(*f*) Inference from *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403.

(*g*) *I.e.*, the law of the matrimonial domicile. See Sewell, *French Law affecting British Subjects*, pp. 112, 113; and *Samuel v. Arrouard* (1893), 21 Clunet, 544.

(*h*) Sewell, p. 113.

(*i*) *Ibid.*; *i.e.*, *W* would not be held to have any such right by an English Court.

local law of Massachusetts. On *H*'s death intestate the leaseholds are sold by his personal representative for 10,000*l*. The money is lodged in a bank in England. The right of *W* in respect of the 10,000*l*. is governed by the local law of Massachusetts (*lex situs*) (*k*).

12. A domiciled Scotsman dies possessed of freeholds and leaseholds in England. He leaves no will, or, what in this case is the same thing, no will which is valid according to the law of England. The freeholds descend to his heir (*l*), according to the law of England (*lex situs*). The leaseholds devolve upon the deceased's next of kin (*m*), as determined by the Statute of Distributions (*lex situs*).

13. *T* is domiciled in England, makes an English will which devises and bequeaths all his real and personal estate both in England and in South Africa to his wife, *W*, for her widowhood, with remainders over. The property devised and bequeathed includes long leaseholds in the Transvaal, where Roman-Dutch law applies to it. *W* is, therefore, entitled to enjoy the leaseholds *in specie* in accordance with such law (*n*).

14. *T*, a French citizen, dies domiciled and resident in a foreign country. He executes a will in accordance with the formalities required by the law of England, *i.e.*, by the Wills Act, 1837 (*o*), but not in accordance with the formalities required by the law of the foreign country. By his will *T* makes a devise of leaseholds and all other his real estate and chattels real in England to trustees. The devise is valid, *i.e.*, the formal validity of the will as regards immovables is governed by the *lex situs* (*p*).

(*k*) The Courts of Massachusetts do not (*semble*) approve the view taken in *In re De Nicols*, [1900] 2 Ch. 410. See 3 Beale, Cases on the Conflict of Laws, p. 530.

(*l*) *Birtwhistle v. Vardill* (1840), 7 Cl. & F. 895.

(*m*) *Duncan v. Lawson* (1889), 41 Ch. D. 394, with which compare *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; and see, as to legitimacy, Rule 146, p. 521, *ante*.

(*n*) See *In re Moses*, *Moses v. Valentine*, [1908] 2 Ch. 235. If English law had applied, the leaseholds would have required to be converted. *Howe v. Earl of Dartmouth* (1802), 7 Ves. 137 a.

(*o*) 1 Vict. c. 26.

(*p*) Compare *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123. This case is an Irish case, and refers to land in Ireland, but undoubtedly is sound in principle, and applies to immovables in England. Note that the will, which also contained bequests of movables, was, as regards them, invalid, as not being executed in accordance with the testator's *lex domicilii*, as to which see chap. xxxi., Rule 195, *post*. See also *Atkinson v. Anderson* (1882), 21 Ch. D. 100; *In re Hernando* (1884), 27 Ch. D. 284. Compare *In re Estate of*

15. *T*, domiciled in a foreign country, devises English immovables to trustees upon trust for sale and investment, and directs the investments to be held upon trusts for accumulation extending beyond the periods allowed by the law of England (*q*). The restrictions on the devise of English immovables, and the proceeds thereof, are governed by the *lex situs*, and the devise is invalid (*r*).

16. *T*, domiciled in England, leaves by will lands in Italy to English trustees upon trust to sell the same, and, having invested the proceeds in English investments, to hold such investments on certain trusts which are valid by the law of England and not valid by the law of Italy. The right of the trustees to take and to sell the land is governed by the law of Italy (*lex situs*). The validity of the trusts as to the proceeds of the land is governed not by the law of Italy, but by the law of England (*lex domicilii*) (*s*).

17. *T*, a British subject, is owner of land in Egypt. He executes a will containing a devise of such land, which devise, if governed by the territorial or local law of Egypt, is invalid. It is uncertain whether, at the time of the execution of his will and of his death, the testator had an English or an Egyptian domicile. On his death his executors sell the land for 16,000*l.*, and pay the sum into an English bank. It is admitted that the validity of the devise must be governed by the *lex situs*, *i.e.*, the law which the Egyptian Courts would apply to the case. It appears under the Code Civil, Arts. 77, 78, as interpreted by experts in Egyptian law, that the law which would be held applicable to the case by Egyptian Courts is, on account of the testator's nationality, the territorial law of England. The devise is valid (*t*).

18. The proceeds of real estate (immovables) in England belonging to a Chilian lunatic resident in Chili, sold under the Partition Act, 1868, represent such real estate, and are not pay-

Von Brentano, [1911] P. 172, for grant of probate of two wills, one in English form affecting English immovables, and one English and foreign movables, in the form of the testator's domicile.

(*q*) *I.e.*, by the Thellusson Act (39 & '40 Geo. III. c. 98).

(*r*) *Freke v. Carbery* (1878), L. R. 16 Eq. 461, with which compare *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541; *In re Rea*, [1902] 1 Ir. R. 451.

(*s*) *In re Piercy*, [1895] 1 Ch. 83.

(*t*) *In re Baines* (unreported), decided by Farwell, J., 19th March, 1903. Compare the Egyptian case, *In re Dale* (1910), cited and commented on by Bentwich, *Law of Domicile*, p. 173. In the case of an intestacy, however, it has been held in Egypt that the territorial law of Egypt is applicable. *In re Goods of Torrey Grant* (1907), *Law Mag. & Rev.*, 1909, p. 297.

able to his Chilian curator, *i.e.*, the appointment of the foreign curator does not affect the title to English real estate (*u*).

19. A person resident in Victoria is the owner of real estate (immovables) in England. He becomes insolvent under a Victorian insolvency. The English real estate is not thereby vested in the insolvent's assignee (*x*).

20 (*y*). *A* agrees with *X* in England to convey to *X* land in India. *X* refuses to accept the conveyance, on the ground that *A* has not a title to the land. *A* claims a good title by prescription. In proceedings by *A* against *X* to compel *X* to accept a conveyance, the question whether *A* has a good title must be determined in accordance with the law of India (*lex situs*) (*z*).

Exception 1 (a).—The effect of a contract with regard to an immovable is governed by the proper law (*b*) of the contract (?).

The proper law of such contract, is, in general but not necessarily, the law of the country where the immovable is situate (*lex situs*) (*c*).

Exception 2.—Where there is a marriage contract, or settlement (*d*), the terms of the contract or settlement govern the mutual rights of husband and wife in respect of all English immovables (land) within its terms, which are then possessed or are afterwards acquired.

(*u*) *Grimwood v. Bartels* (1877), 46 L. J. Ch. 788.

(*x*) *Waite v. Bingley* (1882), 21 Ch. D. 674. See Rule 123, p. 472, *ante*.

(*y*) As to prescription, see p. 548, *ante*. Compare, however, Exception 5, p. 557, *post*.

(*z*) Suggested by *Hicks v. Powell* (1869), L. R. 4 Ch. 741. Compare *In re Peat's Trusts* (1869), L. R. 7 Eq. 302.

(*a*) See as to this Exception chap. xxvi., Rule 163, p. 618, *post*, and comment thereon; *In re Maackenzie*, [1911] 1 Ch. 578; *Bank of Africa (Ltd.) v. Cohen*, [1909] 2 Ch. (C. A.) 129; and App., Note 20, "Law governing Contracts with regard to Immovables."

(*b*) For meaning of "proper law of the contract," see chap. xxv., Rule 155, p. 572, *post*.

(*c*) *Semble*, approved by Kennedy, L. J., *British South Africa Co. v. De Beers*, [1910] 2 Ch. (C. A.) 502, 523.

(*d*) In the absence of a contract the *lex situs* prevails. *Welch v. Tennent*, [1891] A. C. 639, 646, per Lord Herschell; *Lashley v. Hog* (1804), 4 Paton, 581. So in Scotland; see the Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. 5, c. 64), s. 7 (1) and (2).

The marriage contract, or settlement, will be construed with reference to the proper law of the contract, *i.e.*, in the absence of reason to the contrary, by the law of the husband's actual [or intended(?)] domicile at the time of the marriage.

The husband's actual [or intended(?)] domicile at the time of the marriage is hereinafter termed the "matrimonial domicile."

Comment and Illustration.

Whether in this Exception and in the rest of this Digest the term "matrimonial domicile" ought to be extended, so as to mean the intended domicile of the husband, when, as occasionally happens, he, though domiciled in one country, intends, to the knowledge of both parties to the marriage, to become immediately domiciled in another country (*e.g.*, France), is a question on which there is no decisive English authority. On the theory, however, of a tacit or express contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicile, the extension of that term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage seems to be reasonable; in the United States it apparently is held that the matrimonial domicile may sometimes be (as here defined) the "intended domicile" of the husband, and that "at the time of the marriage interest in the personal [movable(?)] property of each spouse passes to the other, if at all, according to the law of the 'matrimonial domicile,' that is, the place where they, at the time of the marriage, contemplate living together; which is usually the domicile of the husband" (e).

Though, subject to this explanation of the term "matrimonial domicile," the meaning of Exception 2 is clear, its existence under English law admits of not unreasonable doubt. It rests on the authority of a single decision, *In re De Nicols* (f), in which

(e) 3 Beale, Cases on the Conflict of Laws, pp. 529, 530; and see *Harral v. Harral* (1884), 39 New Jersey Eq. Rep. 279; *Colliss v. Hector* (1875), 19 Eq. 334. But compare *Cooper v. Cooper* (1888), 13 App. Cas. 88; *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 239, 240, judgment of Vaughan Williams, L. J.

(f) [1900] 2 Ch. 410. Compare *In re Hernando* (1884), 27 Ch. D. 284, where the matrimonial domicile was Spanish, but the proper law of the marriage settlement was English.

Kekewich, J., applied to English immovables the doctrine as to movables laid down by the House of Lords in *De Nicols v. Curlier (g)*. It is impossible to say whether this doctrine would have commended itself to the House of Lords, and it is certain that the question at issue might have been decided on the simple ground that the land in England purchased by the husband represented movables, and, therefore, must fall under the same principle as movables. The validity of the doctrine must, therefore, be admitted to be doubtful; in any case it is not binding on colonial or American Courts, and in the latter it does not seem to meet with general approval (*h*). It is, however, in harmony with the law of Scotland (*i*), but that law goes considerably further than English law in giving effect to dispositions made by persons domiciled outside Scotland which would not be permissible by the *lex situs* (*k*).

Exception 2, however, which we assume to be well established, is subject to limitations which ought to be carefully noted.

(1) It applies to English immovables, but it does not apply to foreign immovables. The rights of the parties to a marriage over such immovables, *e.g.*, land situate in France or in Massachusetts, must (as already pointed out) be determined by an English Court with reference to the *lex situs*, that is, by reference to the law which the Courts of the country where the property is situate, in the one instance France and in the other Massachusetts, deem applicable to the case.

(2) No marriage contract can give to the parties to a marriage any right in respect to English land which is prohibited by English law.

(3) No marriage contract can be enforced in England if its enforcement is opposed to any English rule of procedure or to any English rule as to the formalities with which English land can be conveyed, such, for example, as the Statute of Frauds, ss. 4 and 7. This principle was admitted by all parties in the

(*g*) [1900] A. C. 21. See Rule 184, p. 685, *post*.

(*h*) See 3 Beale, *Cases on the Conflict of Laws*, p. 530.

(*i*) See the Married Women's Property (Scotland) Act, 1920 (10 & 11 Geo. 5, c. 64), s. 6, the effect of which, however, is greatly limited by sect. 1 of the same Act.

(*k*) See *Allan's Trustees* (1897), 24 R. 718; *Pender's Trustees*, [1907] S. C. 217; *Harris's Trustees*, [1919] S. C. 432. The waiver of the *lex situs* is possible under the *nobile officium* of the Court of Session, for which there is no parallel in the practice of the English Courts. For the steps to be taken in England to invoke the aid of the Court of Session, see *In re Georges*, [1921] W. N. 41.

argument of *In re De Nicols*. But the contention that the Statute of Frauds (29 Car. 2, c. 3), ss. 4 and 7, made it impossible to enforce the merely tacit, and therefore unwritten, marriage contract between *H* and *W* with regard to land in England, was rejected by the Court on the ground that the case did not fall within the scope of the statute (*l*), which is inapplicable to a partnership in land.

Illustrations.

1. *H* and *W*, French citizens domiciled in France, intermarry in Paris and are subject to the system of community. They afterwards acquire a domicile in England. *H* makes a fortune in trade and purchases freehold and leasehold land in England. On the death of *H*, *W*'s rights to such land are governed by the law of the matrimonial domicile, viz., France, and *W* is entitled to a half share thereof and a will under which *H* attempts to dispose of the whole of such freehold and leasehold land is, as far as such disposition of *W*'s half share goes, invalid (*m*).

2. *H* and *W* are French citizens domiciled in France. They intermarry in Paris, and intermarry in accordance with the formalities required by French law. *H* afterwards acquires land in Massachusetts. He leaves a will under which he disposes of such land in favour of *A*. *W*'s rights over such land are governed by the *lex situs*, i.e., by the law of Massachusetts, which (*semble*) is, as regards rights over land, the local or territorial law of Massachusetts. *H*'s will, in so far as the question can come before an English Court, is, as regards such land, valid.

Exception 3 (n).—Under Exceptions 1 and 2 to Rule 195 [*i.e.*, under the Wills Act, 1861, ss. 1 and 2], a will made by a *British subject* may, as regards such immovables in the United Kingdom as form part of his personal estate (*o*) (chattels real), be valid

(*l*) Compare Lindley, *Law of Partnership* (8th ed.), pp. 100, 101.

(*m*) See Code Civil, Art. 1401, and *In re De Nicols*, [1900] 2 Ch. 410.

(*n*) *In re Grassi*, [1905] 1 Ch. 584; *In re Watson, Carlton v. Carlton*, [1887] W. N. 142; 35 W. R. 711. See comment on Exceptions 1 and 2 to Rule 195, *post*, and App., Note 21, "The Wills Act, 1861." See also, as to exercise of powers of appointment with regard to such immovables, Rules 199 and 201, *post*.

(*o*) As to the relation between "personal estate," i.e., "personal property," and immovables, see pp. 75, 76, and p. 337, *ante*.

as to form, though not made in accordance with the formalities required by the *lex situs*.

Exception 4.—An assignment of a bankrupt's property to the representative of his creditors under the English or the Irish or the Scottish Bankruptcy Acts or the Indian Insolvency Act is an assignment of the bankrupt's immovables, wherever situate (*p*).

Exception 5 (q).—The limitation to an action or other proceeding in England with regard to a foreign immovable is probably governed by the *lex fori* (*r*).

Comment.

Whether the possessor or occupier of land who has no title thereto has acquired by lapse of time a defence against an action or other proceeding for the recovery thereof, under a law (Statute of Limitations) which bars the *remedy* of the person otherwise entitled to recover the land, is a question of procedure which, on general principles, ought to be determined, and probably is determined, by English Courts in accordance with the *lex fori* (*s*).

It is, however, arguable that the limitation to an action in regard to land is determined by English Courts in accordance with the *lex situs* (*t*). But the authorities in support of this deviation from the well-established principle that procedure is governed by the *lex fori* are, to say the least, not conclusive (*u*). And it is prob-

(*p*) See Rule 81, p. 364, *ante*, and Rule 122, p. 471, *ante*. For an explanation of this statement see Rules cited, and contrast Rule 123, p. 472, *ante*.

(*q*) See *Beckford v. Wade* (1805), 17 Ves. 87; *Hicks v. Powell* (1869), L. R. 4 Ch. 741; *In re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt v. Dacre* (1876), 3 Ch. D. 295. Compare, however, Westlake (5th ed.), s. 171, and Foote (4th ed.), pp. 197—200.

(*r*) As to principle that all matters of procedure are governed by the *lex fori*, see chap. xxxii., *post*.

(*s*) For meaning of *lex fori*, see pp. 69, 78, *ante*.

(*t*) *Beckford v. Wade* (1805), 17 Ves. 87; *Hicks v. Powell* (1869), L. R. 4 Ch. 741; *In re Peat's Trusts* (1869), L. R. 7 Eq. 302; *Pitt v. Dacre* (1876), 3 Ch. D. 295.

(*u*) No certain inference can be drawn from cases having reference to land in England, for when an action is brought in an English Court with reference

able that, while the *acquisition of title to land by prescription* is governed by the *lex situs*, the effect of a Statute of Limitations which only bars the *remedy* for the recovery of land, and does not give a prescriptive title to land, is governed by the *lex fori* (x).

Illustration.

X mortgages land in one of the British colonies to A. X is in England. A brings an action to obtain a foreclosure decree

to English land, the *lex fori* and the *lex situs* coincide, and the case is decided, by whatever name the law be called, in accordance with the law of England.

The cases in which English Courts entertain proceedings with regard to foreign land are necessarily rare and exceptional. (See Rule 53, p. 223, *ante*, and exception thereto, p. 225, *ante*.) And the reported cases having reference to such proceedings may suggest, but do not show conclusively, that English Courts have held questions of limitation to be governed by the *lex situs*.

Beckford v. Wade (1805), 17 Ves. 87, is not a case decided by an English Court in reference to foreign land. It is a decision by the Privy Council as a Court of Appeal from Jamaica. It refers to *prescription*, and only shows that the acquisition of a title to land in Jamaica is determined by the law of Jamaica.

Hicks v. Powell (1869), L. R. 4 Ch. 741, only establishes that, where the *lex situs* deprives a person of title to foreign land, he cannot enforce in England any right depending on the possession of a title under the *lex situs*; but the language of Hatherley, C. (p. 746), suggests that, in proceedings with regard to land, questions of procedure may perhaps be governed by the *lex situs*.

In re Peat's Trusts (1869), L. R. 7 Eq. 302, seems to have been in substance an Indian action. The question to be decided was, what were the shares claimable by different parties interested in a fund in England which represented the proceeds of the sale of land in India. But the decision seems to have rested on the assumption that the right to a share in the fund was the same as the right to a share in the Indian land, and that a person whose right to recover a share in the land was barred by an Indian Statute of Limitations could not in the English proceedings claim the share in the fund which represented such land. It was not, moreover, absolutely necessary to decide what was the effect, in the English proceedings, of the Indian Statute of Limitations.

Pitt v. Dacre (1876), 3 Ch. D. 295, decides that, in an action to recover from a person in England the arrears of an annuity chargeable on and payable out of the rents of land in Jamaica, the time within which an action may be maintained for the recovery of the annuity is determined, not by the English Statute of Limitations, *i.e.*, the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27) (*lex fori*), but by the law of Jamaica (*lex situs*). This is the strongest authority in support of the view that the limitation to an action with regard to land is governed by the *lex situs*; but the case is not, even if rightly decided, quite conclusive. The law of Jamaica, as to the point in question, was the old law of England prior to 3 & 4 Will. IV. c. 27; and it is possible to explain the case simply on the ground that 3 & 4 Will. IV. c. 27, applies only to land in England, and that, as regards foreign land, the *lex fori* is the old law of England, which in this case coincided with the *lex situs*.

(x) See, especially, Story, s. 582; and Foote, pp. 197—200.

against $X(y)$. The time within which such an action can be brought in England is (*semble*) governed by the *lex fori* (z).

(y) See *Paget v. Eds* (1874), L. R. 18 Eq. 118; and compare Exception (p. 225, *ante*) to Rule 53.

(z) When, in accordance with Rule 81 (p. 364, *ante*) and Rule 122 (p. 471, *ante*), an assignment under the bankruptcy law of one country (*e.g.*, England) operates as an assignment to the representative of the bankrupt's creditors of lands situate in another country (*e.g.*, Victoria), the lands, or rather the proceeds thereof, are distributable in accordance with the rules of the English bankruptcy law, and not in accordance with the *lex situs*. This may perhaps be looked upon as a further exception to Rule 150 (p. 542, *ante*). The case, however, seems hardly to come naturally under this head; the subject of distribution is not the lands, but the proceeds of the lands.

CHAPTER XXIV.

MOVABLES (*a*).*Capacity.*

RULE 151 (*b*).—A person's capacity to assign a movable, or any interest therein, is governed by the law of his domicile (*lex domicilii*) at the time of the assignment (?).

This Rule must be read subject to the effect of Rules 152 and 153 (*c*).

Comment.

In principle, capacity for the assignment of a movable, *e.g.*, by gift or sale, should be governed by the *lex domicilii* of the assignor (*d*). Thus if X, a minor domiciled in Scotland, makes a gift of goods in England, his capacity to make, and therefore the validity of, the gift depends (it would seem) upon the law of Scotland. But on this matter it is impossible to speak with certainty.

(*a*) Westlake (5th ed.), chap. vii., and especially ss. 150—153; Foote, pp. 238—252; Phillimore, ss. 581—592; Story, ss. 374—402; Wharton, ss. 297—377; Savigny (Guthrie's transl., 2nd ed.), ss. 366—368, pp. 174—187; Bar (Gillespie's transl., 2nd ed.), ss. 222—223, pp. 488—502.

The Rules in this chapter refer to individual assignment of movables, *e.g.*, by sale or gift. See for General Assignment of Movables in consequence of—

(1) Marriage. (See pp. 685—693, *post*.)

(2) Bankruptcy. (See pp. 364—371, 471—477, *ante*.)

(3) Death. (See pp. 374—385, 485—496, *ante*; and compare chaps. xxx., xxxi., *post*.) See also Rule 154.

(*b*) See Savigny (Guthrie's transl.), s. 367, p. 182. Contrast Wharton, ss. 329—333. Compare *North-Western Bank v. Poynter*, [1895] A. C. 56, especially language of Lord Watson, p. 75, and his observations in *Inglis v. Robertson*, [1898] A. C. 616, 626, 627.

(*c*) See pp. 561, 565, *post*.

(*d*) See, *e.g.*, Savigny, s. 367, p. 182. Though Savigny is, of course, not an authority in England even in the sense in which Story may, within certain limits, be taken as an authority for the guidance of English judges, yet the doctrines supported by the English Courts of recent years, in reference to the choice of law, have tended, especially as regards the law governing the assignment of movables, to coincide with the principles laid down by Savigny. His views, therefore, are well worth referring to on questions as to which no definite decision has been given by English Courts.

Capacity to alienate movables probably stands in the same position as capacity to contract, and there is (*e*) considerable doubt as to the limits within which contractual capacity is governed by the *lex domicilii*. We may, at any rate (it is submitted), assume that, where in fact a good title to a movable is acquired under the *lex situs*, it will be treated as valid in England, even though the person (*e.g.*, a minor) conferring a title under the *lex situs* was incapable of giving a good title under his *lex domicilii*, or, in other words, that Rule 151 is, in case of conflict, liable to be over-riden by either Rule 152 or Rule 153.

Assignment of Movables in Accordance with Lex Situs.

RULE 152 (*f*).—An assignment of a movable which can be touched (*g*) (goods), giving a good title thereto according to the law of the country (*h*) where the movable

(*e*) See chap. xxv., Rule 158, p. 577, and Exception 1, p. 580, *post*.

(*f*) This Rule is approved (*Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. (C. A.) 677, 683, judgment of Vaughan Williams, L. J.), and extended to a cheque of which a transfer is made in a foreign country, which transfer is valid by the law of that country, though it would not have been valid if made in England, under English law. *Cammell v. Sewell* (1860), 5 H. & N. 728; (1858), 3 H. & N. 617; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414, 429, opinion of Blackburn, J., delivered to H. L.; *Inglis v. Usherwood* (1801), 1 East, 515; *Freeman v. E. India Co.* (1822), 5 B. & Ald. 617; *Liverpool Marine Co. v. Hunter* (1867), L. R. 4 Eq. 62; (1868), 3 Ch. 479; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545, judgment of North, J. Though this case is decided by the C. A., [1892] 1 Ch. 219, on a ground different from that taken by North, J., no dissent is expressed from his view as to the authority of the *lex situs*. *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238. For cases of pledge, see *City Bank v. Barrow* (1880), 5 App. Cas. 664; *Inglis v. Robertson*, [1898] A. C. 616. Compare *Mehta v. Sutton* (1913), 108 L. T. 214. In the case of *Embiricos v. Anglo-Austrian Bank*, the defendants acquired a title to the cheque, which was good according to the law of the country where such title was obtained, and ought to be recognized as valid by the Courts of other countries; hence, too, the defendants, in dealing with the cheque, were not guilty of conversion. In the case, on the other hand, of *Lacave v. Crédit Lyonnais*, the defendants had not, according to the law of any country, acquired a valid title to the cheque, and therefore, by dealing with the cheque, became guilty of conversion. See *In re Korvine's Trust*, [1921] 1 Ch. 343, in which case the validity was asserted of a *donatio mortis causa* by a domiciled Russian subject, made in England in the form allowed by English law.

(*g*) Movables (as already pointed out, pp. 69, 75—77, *ante*) are either things which can be moved and touched, *i.e.*, goods, or things which cannot be touched, *i.e.*, choses in action or debts. As to the assignment of the latter, see Rule 153, p. 565, *post*.

(*h*) The term "law of the country" does not apply to legislative or adminis-

is situate at the time of the assignment (*lex situs*) (*i*), is valid (*k*).

Comment.

“As to personal chattels (*l*), it is settled that the validity of a transfer depends, not upon the law of the domicile (*m*) of the owner, but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in the house tenanted by an Englishman in this country may be sold for the tenant’s rent, and the purchaser acquires a perfect title, whatever may be the law of the owner’s domicile. So the goods of a foreigner sold here in market overt by one who had no title to them could not be recovered from the purchaser. In both cases the property would pass to him by our law.

“ . . . The cases on the subject are clear and consistent. In *Cammell v. Sewell* (*n*), the master of a Prussian vessel sold the

trative measures taken by a revolutionary government not recognized by the British Government as the government of a sovereign State. Hence, when the Soviet Government of Russia, which was not recognized by the British Government as the government of a sovereign State, purported to confiscate wood in Russia, the property of a company incorporated in Russia, and sold it to a firm in England, it was held that the company’s title to the wood must prevail over that of the English firm. *Aksionairnoye Obschestvo A. M. Luther v. Sagor & Co.* (1920), 37 T. L. R. 282; [1921] 1 K. B. 456. Compare *Ogden v. Folliott* (1790), 3 T. R. 726, 731. After, however, the recognition of the Soviet Government was proved, the decision in this case was reversed: 37 T. L. R. 777. In such a case the recognition has operation from the time at which the government came into power. Compare *Williams v. Bruffy*, 96 M. S. 176, 186, per Field, J.; *Underhill v. Hernandez*, 168 U. S. 250, 253, per Fuller, C. J. Nor is it contrary to English views of morality to give effect to a decree of confiscation by a *de facto* government. Compare *Santos v. Illidge* (1860), 8 G. B. (N. S.) 861, 876, per Blackburn, J.; *Madrado v. Willes* (1820), 3 B. & Ald. 353, where property in slaves duly acquired under foreign laws was recognized.

(*i*) The mere fact that goods which are being carried in a ship are to be landed at a Scottish port does not make them movables situate in Scotland to such an extent that the effect of an assignment in England of the bill of lading must be governed by the Scottish law as to pledge. See *Inglis v. Robertson*, [1898] A. C. 616, 626, 627, per Lord Watson, commenting on *North Western Bank v. Poynter*, [1895] A. C. 56.

(*k*) *I.e.*, of course, in England.

(*l*) See, for whole of this quotation, *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, 267, 268, judgment of Kay, L. J.

(*m*) This language probably only refers to cases in which a title acquired under the owner’s *lex domicilii* comes into competition with a title acquired under the *lex situs* of the movable. We should go further than the authorities justify if we laid down that under no circumstances could a title acquired merely under the *lex domicilii* be good (see Rule 154, p. 568, *post*).

(*n*) (1858), 3 H. & N. 617; (1860), 5 H. & N. 728; 29 L. J. Ex. 350.

“goods of an Englishman, which were on board his ship in Norway, under circumstances which gave the purchaser no title according to English law, but a good title according to the law of Norway; and it was held in the Exchequer Chamber that the law of Norway must govern the transaction, and that the property had passed to the purchaser. The authority of that decision was recognised in *Hooper v. Gumm* (o), and by the House of Lords in *Castrique v. Imrie* (p) and *Williams v. Colonial Bank*” (q).

“In my view,” says North, J., in another case, “. . . it is not necessary for me to express any opinion on this interesting and difficult question [viz., as to the effect of the *lex domicilii*]; for, assuming the principle above stated [viz., *mobilia sequuntur personam*] to include such a case as the present, there is another equally well-known rule of law, viz., that a transfer of movable property, duly carried out according to the law of the place where the property is situated, is not rendered ineffectual by showing that such transfer as carried out is not in accordance with what would be required by law in the country where its owner is domiciled. To give an instance. According to Scotch law it is necessary, in order to give a charge on corporeal movables, that they should be delivered to and placed in the possession of the creditor. But if a domiciled Scotchman resident in London gave a duly registered bill of sale on the furniture of his house, that would be a complete and effectual transfer of the property, without its being delivered to the creditor, notwithstanding that such a disposition of furniture in Scotland would have been ineffectual without delivery” (r).

These judicial dicta are, it is submitted, decisive in support of Rule 152. They show that the notion once prevalent, and in favour of which strong dicta may be cited (s), that the transfer or assignment of an individual movable was invalid unless made in accordance with the owner's *lex domicilii*, is now rejected by our Courts, and that the transfer of goods in accordance with the *lex situs* gives a good title in England whatever be the domicile of the owner or whatever the mode of transfer.

(o) (1867), L. R. 2 Ch. 282.

(p) (1870), L. R. 4 H. L. 414.

(q) (1890), 15 App. Cas. 267.

(r) *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545, judgment of North, J.

(s) *E.g.*, judgment of Loughborough, C., in *Sill v. Worswick* (1791), 1 H. Bl. 665, 690.

A judgment *in rem* by a Court of competent jurisdiction which transfers the property in goods from one person to another is *à fortiori* conclusive, and gives a good title to the person in favour of whom the judgment is given (*t*), and the effect in this respect of such a judgment may now be considered a deduction from the principle stated in Rule 152. This should be noted, because most if not all of the decisions, as contrasted with the judicial dicta, which can be cited in support of our Rule, refer to judgments or to proceedings of a judicial character (*u*).

Illustrations.

1. *A* is a domiciled Frenchman. His watch is stolen in London and sold to *X* in market overt. *X* acquires a good title against *A*, even if *A* shows that a sale in market overt does not give a good title according to the law of France (*v*).

2. *A* is domiciled in Germany, but is resident in lodgings in London. His goods are seized by the superior landlord, under a distress for rent due from the lodging-house keeper. The goods are sold to *X*. *X*, whatever the law of Germany, has a good title to the goods as against *A* (*x*).

3. *A* is domiciled in England. His ship is wrecked on the coast of Norway. The cargo is sold, wrongfully according to English law, by *M*, the captain, to *X*, who acquires a good title according to Norwegian law. *X* brings the goods to England. *X* has a good title here to the goods against *A* (*x*).

4. A cheque on a London bank is drawn in Roumania in favour of *A*. It is stolen whilst in the post and presented by the thief at a bank in Vienna, which cashes the cheque in circumstances which, under Austrian law, give the bank a good title to the cheque and the proceeds thereof. The Vienna bank sends the cheque to *X & Co.*, English bankers, who obtain payment of the cheque at the London bank on which it is drawn. *A* sues *X & Co.* for conversion. *X & Co.* have a good title to the cheque as against *A*, *i.e.*, the Vienna bank acquire a good title under the law of Austria,

(*t*) See chap. xvii., Rule 118, p. 465, *ante*.

(*u*) *E.g.*, *Cammell v. Sewell* (1860), 5 H. & N. 728; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219.

(*v*) See, for these cases, *Cammell v. Sewell* (1860), 5 H. & N. 728, 743, 744, *per curiam*. Compare language of Kay, L. J., in *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, 267, 268, cited p. 562, *ante*.

(*x*) *Ibid*.

where the cheque is transferred, and assign that title to *X & Co. (y)*.

RULE 153 (*z*).—An assignment of a movable which cannot be touched, *i.e.*, of a debt, giving a good title thereto according to the *lex situs* of the debt (in so far as by analogy a *situs* can be attributed to a debt), is valid.

Provided that

- (1) the liabilities of the debtor are to be determined by the law governing the contract between him and the creditor (*a*);
- (2) the right to recover the debt is, as regards all matters of procedure, governed by the *lex fori* (*b*).

Comment.

There has been, and still exists, some uncertainty as to the law which, in case of conflict, governs the assignment of a debt. It has sometimes been held to be the *lex fori* (*c*). According to another view, the law governing the assignment is the law of the domicile of (apparently) the creditor (*d*). The doctrine which is now pretty well established in England is that which is enunciated in our Rule, *viz.*, that an assignment of a debt is valid if made in accordance with the *lex situs*, in so far as a *situs* or locality can be by a sort of analogy attributed to a debt.

For a debt, though it has not in strictness any local situation, may be so connected in different ways with a particular country

(*y*) *Embiricos v. Anglo-Austrian Bank*, [1905] 1 K. B. (C. A.) 677.

"The transfer of the cheque in Vienna was governed by Austrian law, and "gave the Vienna bank a good title to the cheque," which title they transferred to *X & Co.* See *ibid.*, p. 679, and [1904] 2 K. B. 870, judgment of Walton, J., which was upheld by the Court of Appeal.

(*z*) See, especially, Foote (4th ed.), pp. 250—251; Westlake (5th ed.), ss. 152, 153; Story, ss. 395—400 b and 565; *Innes v. Dunlop* (1800), 8 T. R. 595; *O'Callaghan v. Thomond* (1810), 3 Taunt. 82; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238. The Rule is approved in *In re Maudslay, Sons & Field*, [1900] 1 Ch. 602, 610, 611, per Cozens-Hardy, J.

(*a*) *Colonial Bank v. Cady* (1890), 15 App. Cas. 267.

(*b*) See chap. xxxii., *post*.

(*c*) *The Milford* (1858), Sw. 362.

(*d*) See, especially, Story, s. 397.

as to possess something which bears an analogy or resemblance to a *situs*. Thus, the place where a debtor resides (or perhaps where a debt is made payable) may be, and for many purposes is, held the *situs* of the debt; and so, again, where a debt arises from a bill of exchange or other negotiable instrument, the bill or instrument has itself a local situation which may be, and is in fact, treated for many purposes as the *situs* of the debt (*e*). When, therefore, a *situs* or local situation can be thus artificially ascribed to a debt, the assignment thereof in accordance with the *lex situs* is, speaking generally, a valid assignment (*f*). Hence the sale of a bill in accordance with the law of the country where the bill is situate is a valid assignment or transfer of the bill and the rights arising under it (*g*).

Provisos.—We must, however, in this matter distinguish between the *validity* of the assignment or transfer of the debt and the *effect* of the assignment as against the original debtor.

The *validity* of the assignment depends on the *lex situs*, *i.e.*, on the law of the place where the debt is to be considered as situate.

The *effect*, on the other hand, of the assignment as against the debtor, *i.e.*, what are the rights acquired by the assignee, must (it is submitted) depend on the law which governs the contract between the debtor and the creditor (assignor). Under whatever law the assignment takes place, the liability of the debtor, *X*, cannot be increased through the assignment by the creditor to another person of the claim against the debtor (*h*).

The rights, further, of set-off and the like, which under English

(*e*) Compare pp. 342—347, *ante*; *In re Maudslay, Sons & Field*, [1900] 1 Ch. 602, 609; *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385, where it was held that an English promissory note payable to bearer was transferable by delivery in a foreign country, irrespective of the law of that country.

(*f*) The two recent cases, *In re Queensland, &c. Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219, and *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238, which most distinctly affirm the validity of an assignment of a movable in accordance with the *lex situs*, both refer to the assignment of a chose in action or debt.

Compare *Colonial Bank v. Cady* (1890), 15 App. Cas. 267, and same case, *nom. Williams v. Colonial Bank* (1888), 38 Ch. D. (C. A.) 388. In *Lee v. Addy* (1886), 17 Q. B. D. 309, an assignment of an English life insurance policy in the Cape of Good Hope to the wife of the assignor was held invalid, as contrary to the law of the Cape, where the parties were domiciled, a debt being held to have no *situs*. See pp. 312, 313, per Day, J. Contrast *Le l'œuvre v. Sullivan* (1855), 10 Moore, P. O. 1, where English law was held applicable to an assignment in Jersey of an English insurance policy.

(*g*) *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

(*h*) See Foote, pp. 250, 251.

law are treated as matters of procedure (*i*), are governed wholly by the *lex fori*.

Illustrations.

1. An English bill payable in England is drawn and accepted in England by an English firm domiciled in England. It is indorsed in Norway for value to *B*. In consequence of judicial proceedings in Norway against *L* (*B*'s partner), the bill is seized in accordance with Norwegian law, and, on judgment being given against *L*, is, when overdue, sold in accordance with Norwegian law to *A*. Under the law of Norway, *A*, though the bill is overdue, takes a perfect title to the bill and the proceeds thereof freed from all equities or claims of *B*. Under the law of England, a purchaser of the bill in England would, the bill being overdue, have taken it subject to the claims of *B*. The validity of the assignment is governed by the law of Norway, and *A*'s claim to the bill and the proceeds thereof is valid as against *B* (*k*).

2. *X & Co.*, an English banking company, assign to *B* debts owing to *X & Co.* from debtors resident in Scotland. No notice of the assignment is given to the Scottish debtors. *A* brings an action in Scotland against *X & Co.* and arrests (attaches) the debts due from the Scottish debtors to *X & Co.* Under Scottish law, the arrestment is equivalent to an assignment to *A* with intimation or notice to the debtors. Under the law of England, the assignment to *B* would, under the like circumstances, take priority over the assignment to *A*. *A* obtains judgment in Scotland against *X* for more than the amount of the debts arrested. He has obtained a good title under the assignment in accordance with the *lex situs* (Scotland). The assignment is valid, and the claim of *A* has priority to the claim of *B* (*l*).

3. *X*, an Englishman, incurs in England a debt to *A*, also an Englishman. The debt is assigned in France by *A* to *B*. The validity and extent of *B*'s claim against *X* is governed by the law

(*i*) See chap. xxxii., Rule 203, *post*.

(*k*) *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238. See, especially, pp. 253—255, judgment of Romer, J.; pp. 263, 264, judgment of Lindley, L. J.; pp. 267, 268, judgment of Kay, L. J.

(*l*) Compare *In re Queensland, & Co.*, [1891] 1 Ch. 536; [1892] 1 Ch. (C. A.) 219. This case is decided by North, J., on the ground given in the illustration. It is decided by the Court of Appeal (affirming the judgment of North, J.) on a different ground, but the Court does not seem to question the soundness of the view taken by North, J. Note that *In re Queensland, & Co.* is an instance of a distinct conflict between the *lex situs* and the *lex domicilii*, and that the *lex situs* prevailed. Compare *Le Fèvre v. Sullivan* (1855), 10 Moore, P. C. 1.

of England, *i.e.*, it depends upon the obligations incurred under English law by *X* to *A*.

4. The circumstances of the case are the same as in Illustration 3. *B* brings an action against *X* for the debt. *X*, at the time of contracting the debt, has a set-off against *A*. *X* can plead the set-off in the action by *B*.

5. In 1891, *H*, domiciled in New York, assigns in New York to *W*, his wife, a reversionary interest in an English trust fund. Under the law of New York notice is not required in order to complete the assignment. In 1894, *H*, being in England, assigns the said interest to *A* by way of mortgage. Notice of the later assignment is given to the English trustees. In an administration action in England the later assignment in favour of *A* is good against the earlier assignment in favour of *W*, *i.e.*, the effect of notice is determined by the law of England (*lex situs*) and not by the law of New York (*m*).

RULE 154(*n*).—Subject to the exception hereinafter mentioned, and to Rules 152 and 153(*o*), the assignment of a movable, wherever situate, in accordance with the law of the owner's domicile, is valid.

Comment and Illustrations.

“The general rule is, that a transfer of personal property, good by the law of the owner's domicile, is valid wherever else the property may be situate” (*p*). “The transfer of personal property must be regulated by the law of the owner's domicile, and, if valid by that law, ought to be so regarded by the Courts of every other country where it is brought into question” (*q*).

(*m*) *Kelly v. Selwyn*, [1905] 2 Ch. 117. The *ratio decidendi* was “the law of the Court which is administering the fund,” which is equivalent to “the law of the forum for the recovery of the debt,” which “presents much analogy with the *situs* of a corporeal movable.” See Westlake (5th ed.), p. 214. Compare *Peillon v. Brooking* (1858), 25 Beav. 218. A restraint on anticipation imposed by an English settlement is valid despite its conflict with the law of the domicile. Compare Rule 184, p. 685, *post*.

(*n*) See Story, s. 384.

(*o*) See p. 561 and p. 565, *ante*.

(*p*) Story, s. 384. Compare *North Western Bank v. Poynter*, [1895] A. C. 56.

(*q*) *Liverpool Marine Co. v. Hunter* (1868), L. R. 3 Ch. 479, 483, judgment of Chelmsford, C. This dictum, however, was specially evoked by the case of transfer of ships at sea, where no *lex situs* is applicable. The case itself illustrates Rule 152, p. 561, *ante*.

"It seems clear that a transfer of movables, here good by our law, would here be held good, notwithstanding that it might not comply with formalities required by the law of the domicile of the owner, but there has not been quoted to me, nor have I found, any clear case of a transfer, good according to the law of the domicile of the owner, and made there, but held bad for not conforming to the law of the country where the goods are situate" (r).

The cases which illustrate these authoritative dicta have mainly, if not exclusively, reference to general assignments of movables. No reported case can (it is believed) be cited as absolutely supporting this Rule (s) in reference to individual assignments, *e.g.*, by gift or sale; but the validity of such assignments, when made in accordance with the owner's *lex domicilii*, is so uniformly taken for granted by judges and by writers of eminence, such as Story, that we may assume that a sale or gift by a person domiciled in England will, at any rate if made in England, be held (if it be in accordance with English law) to be valid as regards goods, wherever situate.

And it may possibly be the case that such sale or gift of goods situate in England, by a person domiciled in a foreign country, which is made in accordance with, and is valid by, the law of his domicile, will be held valid in England. *N* is a trader domiciled in Maryland, and carrying on business both in Maryland and in England. He is owner of movable property in England. *N*, under a deed of arrangement executed in Maryland, assigns all his property to *A*, as trustee, for the benefit of his creditors. The deed is valid according to the law of Maryland (*N*'s *lex domicilii*), but is not registered in accordance with the Deeds of Arrangement Act, 1887 (50 & 51 Vict. c. 57), ss. 4, 5, and therefore, if governed by the law of England (*lex situs*), is void. After the deed has been executed, *X*, a creditor who has obtained judgment in England

(r) *Dulaney v. Merry & Son*, [1901] 1 Q. B. 536, 541, 542, judgment of Channell, J.

(s) The cases which may be cited refer to general assignments, *e.g.*, in case of death, save *North Western Bank v. Poynter*, [1895] A. C. 56, which deals with the rights of an assignee of a bill of lading of goods landed in Scotland, assignor and assignee being domiciled in England, where the assignment was made. It is not, however, clear that the *situs* of the goods was properly taken to be in Scotland (see p. 562, *ante*), so that the case may illustrate Rule 152, p. 561, *ante*. In any case the Court held that there was no actual conflict of English and Scottish law. In *Lee v. Aday* (1886), 17 Q. B. D. 309 (p. 566, *ante*), the Court declined to treat the insurance policy as having a local *situs*, so that no conflict of law arose between the *lex situs* and *lex domicilii*.

against *N*, causes *N*'s movable property in England to be taken in execution. The title of *A* to the property has been held valid as against the title of *X* (*t*). But the property in this case passed under a general assignment. How far, therefore, the principle of Rule 154 applies to cases of individual assignments still admits of much doubt.

1. *X*, domiciled and being in England, makes a gift by deed to *A* of goods at Paris. The gift is valid here without reference to French law (*u*). If *X* were to bring the goods to England, no third person (*x*) having acquired a title to them under French law, the goods would be held to be the property of *A*.

2. The same result ought (it would seem) to follow if *X*, when domiciled in England, but being in France, makes a gift by deed to *A* of goods at Paris. In such a case, however, our Courts would possibly hold that the form required by the *lex loci* was imperative, and that therefore, if the gift does not, by the law of France, pass the property in the goods, there has been no transfer of property at all.

3. *X*, again, domiciled and being in a foreign country, where property in goods can be conveyed by a verbal gift, gives *A*, by word of mouth, furniture of *X*'s in London. The property (perhaps) passes to *A*.

It must, however, remain doubtful whether, at any rate, the two last examples do not fall within the exception to our Rule.

Exception.—When the law of the country where a movable is situate (*lex situs*) prescribes a special form of transfer, an assignment according to the law of the owner's domicile (*lex domicilii*) is, if the special form be not followed, invalid (*y*).

(*t*) *Dulaney v. Merry & Son*, [1901] 1 Q. B. 536. See, now, the Deeds of Arrangement Act, 1914 (4 & 5 Geo. 5, c. 47).

(*u*) As to French law, see Code Civil, Art. 931.

(*x*) This limitation must probably be added in accordance with Rule 152, p. 561, *ante*. See *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Cammell v. Sewell* (1860), 5 H. & N. 728; *Stringer v. English, &c. Ins. Co.* (1870), L. R. 5 Q. B. 599.

(*y*) Story, s. 383. See *Robinson v. Bland* (1760), 2 Burr. 1077, 1079; 1 W. Bl. 234, 246. The exact limits of this exception are, like the limits of the Rule itself, hard to fix. Compare *Dulaney v. Merry & Son*, [1901] 1 Q. B. 536, 542, judgment of Channell, J., and *Coote v. Jecks* (1872), L. R. 13 Eq. 597, where it was held that the English Bills of Sale Act does not apply to a bill of sale of goods in Scotland given in England by an English debtor to an English

Comment.

The law of the owner's domicile does not determine the validity of a transfer of movables, if "there is some positive or customary law of the country where they are situate providing for special cases (as is sometimes done), or, from the nature of the particular property, it has a necessarily implied locality" (z). Among the latter class have been placed contracts respecting public funds or stock, the local nature of which requires them to be carried into execution according to the local law. No positive transfer can be made of such property except in the manner prescribed by the local regulations (z).

creditor. So, also, as regards goods in Ireland. *Brookes v. Harrison* (1880), 6 L. R. Ir. 85. In the Scottish case, *Great Northern Railway Co. v. Laing* (1848), 10 D. 1408, a mandate executed in England was treated as effective though not in accordance with Scottish law in point of form.

(z) Story, s. 383; *Dulaney v. Merry & Son*, [1901] 1 K. B. 536, 542. In *Smelting Co. of Australia v. Commissioners of Inland Revenue*, [1897] 1 Q. B. (C. A.) 175, an assignment of a patent in England was held valid for stamp duty, although registration of the transfer was required in New South Wales. See judgment of Rigby, L. J., at p. 183. A distinction is drawn in *re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351, 357, per Jessel, M. R., between the assignment of a beneficial interest and a legal transfer in respect of French Government stocks. Hence an instrument invalid as an assignment may be valid as a contract to assign. Cf. p. 545, *ante*, and p. 586, *post*.

CHAPTER XXV.

CONTRACTS (a).—GENERAL RULES.

(A) PRELIMINARY.

RULE 155 (b).—In this Digest the term “proper law of a contract” means the law, or laws, by which the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed (c); or (in other words) the law or laws to which the parties intended, or may fairly be presumed to have intended, to submit themselves.

Comment.

A contract is a promise, or set of promises, enforceable, or intended, at any rate, to be enforceable, by law. The parties to a contract must always, therefore, intend, or be presumed to intend, that it shall be subject to, or governed by, the law of some country (e.g., England), or, it may be, that part of the contract shall be governed by the law of one country (e.g., of England) where it is made and part of the contract by the law of another country (e.g., of Scotland) where it is to be performed (d). The law or laws

(a) Story, chap. viii., especially ss. 241—373; Westlake (5th ed.), chaps. xii. and xiii.; Foote (4th ed.), chap. viii., pp. 321—447; Wharton, ss. 393—546; Pollock, Principles of Contracts (8th ed.), pp. 405—416; Savigny (Guthrie's transl., 2nd ed.), ss. 369—374, pp. 194—272; Bar (Gillespie's transl., 2nd ed.), ss. 247—284, pp. 536—630.

(b) For the substance of this definition, see *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122, 123, *per Curiam*, judgment delivered by Willes, J.; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 336, judgment of Halsbury, C. Compare comment on Rule 160, p. 588, *post*. See also *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Spurrier v. La Cloche*, [1902] A. C. 446, 450; *In re Fitzgerald*, [1904] 1 Ch. (C. A.) 573; *British South Africa Co. v. De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502 (reversed on a different point, [1912] A. C. 52); *In re Smith*, [1916] 2 Ch. 206.

(c) Or, more accurately, though in more cumbersome language, “the law of the country, or the laws of the countries, by the law or the laws whereof the parties to a contract intended, or may fairly be presumed to have intended, the contract to be governed.”

(d) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

by which it is intended that a contract shall be governed may be conveniently termed the "proper law of a contract" (e).

Illustrations.

1. A Scotsman and an Englishwoman marry in England. It is provided by the terms of their marriage contract that the contract shall be governed by the law of Scotland. The law of Scotland is the proper law of the contract (f).

2. A Scotsman domiciled in Scotland marries in England a Scotswoman, also domiciled in Scotland. The marriage contract or settlement is, before their marriage, executed in England. It is in the Scottish form. The law of Scotland is the proper law of the contract.

3. X, an English underwriter, enters into an English policy of insurance with A, an English shipowner. It is part of the terms of the policy that a particular term in it shall be interpreted in accordance with French law. The law of England and the law of France, to the extent intended by the policy, constitute the proper law of the contract.

RULE 156 (g).—Where any Act of Parliament intended to have extra-territorial operation makes any contract—

(1) valid, or

(2) invalid,

the validity or invalidity, as the case may be, of such contract must be determined in accordance with such Act of Parliament, independently of the law of any foreign country whatever (h).

(e) As to the rule for ascertaining the intention of the parties, or, in other words, for determining what is the "proper law," see Rule 161, p. 602, and Sub-Rules 1—3, pp. 606—615, *post*.

(f) Compare *Chamberlain v. Napier* (1880), 15 Ch. D. 614; *Colliss v. Hector* (1875), 19 Eq. 334.

(g) See Intro., General Principle No. II. (A.), p. 34, *ante*.

(h) For examples of such Acts determining—

Capacity, see the Marriage Act, 1835 (5 & 6 Will. IV. c. 54); the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47); *Brook v. Brook* (1861), 9 H. L. C. 193; the Royal Marriage Act, 1772 (12 Geo. III. c. 11); *The Sussex Peerage Case* (1844), 11 Cl. & F. 85.

Form, see the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), and conf. *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705; Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 72.

Legality, see Slave Trade Acts (5 Geo. IV. c. 113; 7 Will. IV. & 1 Vict. c. 91; 6 & 7 Vict. c. 98; 36 & 37 Vict. c. 88).

Comment.

Sometimes, though not often, an Act of Parliament lays down a positive rule as to the validity or invalidity of a contract, wherever made. Whenever an Act of Parliament thus validates or invalidates a contract, a British Court must obey the enactment, without considering the effect of any foreign law which might otherwise be applicable to the case.

Illustrations.

1. A British subject marries a Frenchwoman at Paris. The marriage is celebrated in accordance with the provisions of the Foreign Marriage Act, 1892. The marriage is invalid in France for want of compliance on the part of the woman with the formalities required by French law. The marriage is valid, *i.e.*, its validity is determined solely by reference to the provisions of the Foreign Marriage Act, 1892 (*i*).

2. A member of the British Royal Family marries a foreign woman in a foreign country, in contravention of the provisions of the Royal Marriage Act (12 Geo. III. c. 11), which apply to members of the Royal Family wherever and under whatever circumstances they marry. The marriage, whether valid or not by the law of the foreign country, is invalid, *i.e.*, its validity is determined solely by reference to the Royal Marriage Act (*k*).

3. A British subject, when in a foreign country, lends money to be employed in slave trading, in contravention of the Slave Trade Act, 1824 (5 Geo. IV. c. 113), s. 2, and the Slave Trade Act, 1843 (6 & 7 Vict. c. 98). The contract, whether lawful by the law of the foreign country or not, is invalid (*l*).

4. *X* and *A* visit Monte Carlo from time to time to gamble at the tables there. *A* advances the sum necessary for these expeditions. *X* keeps an account of the financial results of the expeditions, and admits that he lost money in gambling at the tables, and is indebted to *A* for money advanced to *X* for the purpose of so gambling. There is nothing in the law of Monte Carlo which makes either gambling or the advance of money for the purpose of gambling illegal. On *X*'s death, before repayment of the sums

(*i*) See *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705. See, further, chap. xxvii., Rule 182 (*v*), p. 662, *post*.

(*k*) *The Sussex Peerage Case* (1844), 11 Cl. & F. 85. Contrast *Swift v. Attorney-General for Ireland*, [1912] A. C. 276, in which it was held that the Act 19 Geo. 2, c. 13, s. 1, had no extra-territorial operation.

(*l*) Compare *Reg. v. Zulueta* (1843), 1 C. & K. 215.

due to *A*, he claims from *X*'s executrix the amount due to *A*. *A* has a right to recover such amount (*q*).

RULE 157 (*m*).—A contract otherwise valid cannot be enforced if its enforcement is opposed to any English rule of procedure (*n*).

Comment and Illustrations.

This Rule is easy to understand, and illustrations of its operation are easy to find.

1. *X*, at Calais, orally engages *A* to serve him as a clerk for more than a year; there is no written memorandum of the contract. The agreement, though not in writing, is valid by French law. But under the fourth section of the Statute of Frauds no action can be brought on such a contract unless there is a memorandum thereof in writing. *A* cannot enforce the contract in England against *X* (*o*).

2. *A*, a Frenchman, wins 100*l.* from *X*, a Frenchman, on bets made in France upon the result of a race taking place in France.

(*q*) See *Saxby v. Fulton*, [1909] 2 K. B. (C. A.) 208. Compare *Quarrier v. Colston* (1842), 1 Phillips, 147, which was decided before the Gaming Act, 1845 (8 & 9 Vict. c. 109). Neither that Act nor the Gaming Act, 1892 (55 Vict. c. 9), makes the transactions stated in this illustration illegal. The former Act makes wagering contracts null and void and forbids suits being brought to recover money won on wagers; the latter makes null and void a promise to pay any person any money paid by him under a contract rendered null and void by the Act of 1845. As the Act of 1845 cannot obviously be interpreted as rendering null and void wagering contracts entered into abroad, the Act of 1892 cannot apply to a transaction in respect of such contracts, even if it applied to a similar transaction in respect of an English wagering contract.

It is, however, uncertain whether the Gaming Act, 1892, renders it impossible to recover money lent for the purpose of making bets. It has been decided that it does not apply to money lent to pay wagering debts already incurred (*In re O'Shea*, [1911] 2 K. B. (C. A.) 981), and *Carney v. Plimmer*, [1897] 1 Q. B. 694, certainly does not establish that the Act applies to money lent to make bets. See also 20 *Law Quarterly Review*, p. 634; Anson, *Law of Contract* (15th ed.), pp. 236, 237; *Saffery v. Mayer*, [1901] 1 K. B. (C. A.) 11, which is not a case of a loan, but of advances for bets on a joint account; *Tatam v. Reeve*, [1893] 1 Q. B. 44.

(*m*) See *Bristow v. Sequeville* (1850), 5 Ex. 275; 19 L. J. Ex. 289; *Leroux v. Brown* (1852), 12 C. B. 801. Conf. *Gibson v. Holland* (1865), L. R. 1 C. P. 1. See Intro., General Principle No. II. (B.), p. 34; and see pp. 37, 38, *ante*.

(*n*) As to wide meaning of term "procedure," see chap. xxxii., Rule 203, *post*.

(*o*) Compare *Leroux v. Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1; *Gibson v. Holland* (1865), L. R. 1 C. P. 1.

The Gaming Act, 1845, s. 18, enacts that no suit shall be brought in any Court of law or equity for recovering any sum of money alleged to be won upon a wager. *A* cannot enforce the wager in England against *X*, *i.e.*, he cannot recover the 100*l.*, and this is so even though the wager be lawful and the 100*l.* be recoverable in France (*p*).

3. *X* in France gives a cheque, drawn by him on an English bank, partly in payment of money lent by *A* to *X* to enable him to play at baccarat at a club in France, and as to the balance to be applied by *A* in discharging the debts incurred by *X* when playing baccarat in the club. The consideration for the cheque is legal according to the law of France, but under the Gaming Act, 1835 (5 & 6 Will. IV. c. 41), s. 4, a security given for money knowingly advanced for playing at cards is to be deemed given for an illegal consideration. An action is brought upon the cheque by *A*. *A* cannot recover upon it in an English Court (*r*).

It is worth while to notice here a marked distinction between cases which come within Rule 156 and cases which come within Rule 157, now under consideration. Where a contract is alleged to be within Rule 156, the person making the allegation must show that the Act of Parliament which makes a given contract valid or invalid, as the case may be, was intended by Parliament to have extra-territorial operation, *i.e.*, to operate outside England; where, on the other hand, it is alleged that a contract falls within Rule 157, the person relying on the allegation must show that the rule of law which prevents the enforcement of the contract is a rule of procedure. But if this can be shown there is no need to prove that it has extra-territorial operation. A statute, for example, makes wagering contracts void. If it is alleged that this enactment renders void a wager made in a foreign country where the wager is lawful and valid, then the person relying on the invalidity of the wager must show that the statute was intended to apply to wagers made out of England. If, on the other hand, a statute enacts that no action shall be brought for the recovery of money

(*p*) Compare *Browne v. Bailey* (1908), 24 T. L. R. 644. In that case the suit was also barred by the fact that it was based on a cheque given in France in respect of losses in betting.

(*r*) This is the true explanation of the decision in *Moulis v. Owen*, [1907] 1 K. B. (C. A.) 746; see judgments of Collins, M. R., p. 750, and of Cozens-Hardy, L. J., at p. 756. Compare *Wynne v. Callender* (1826), 1 Russ. 293. Note that, if *A* had sued on the debt owing to him, and not on the cheque, he would have been able to recover. See *Saxby v. Fulton*, [1909] 2 K. B. (C. A.) 208; and p. 575, *ante*.

lost on a wager, then it is necessary for the person relying on the statute for a defence against the action to show what, in the particular instance, is self-evident—that the enactment lays down a rule of procedure; but there is no need to show that the enactment was intended to operate beyond the limits of England (s).

(B) *VALIDITY OF CONTRACT.*

(i) *Capacity.*

RULE 158 (t).—Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract.

- (1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid (u).
- (2) If he has not such capacity by that law, the contract is invalid.

Comment.

The general principle of English law seems now to be that a person's capacity to contract, or in other words to bind himself by a promise, is governed by the law of the country where he is domiciled.

(s) Compare Cohen, 20 Law Quarterly Review, pp. 127—130.

(t) See *Re Da Cunha* (1828), 1 Hagg. Ecc. 237; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88; *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46; *Viditz v. O'Hagan*, [1900] 2 Ch. (C. A.) 87; *In re Bankes*, [1902] 2 Ch. 333, 343. See also *M'Feetridge v. Stewarts*, [1913] S. C. 773 (Ct. of Sess.), and p. 583, *post*; Westlake (5th ed.), chap. iii., pp. 43—48; Foote (4th ed.), pp. 67—72. Compare Story, ss. 64, 81, 82. It should be added that the view of these writers is expressed in very doubtful terms; and Foote and Story, at any rate, seem to incline to the doctrine that contractual capacity is governed by the law of the country where the contract is made (*lex loci contractus*).

Note that this Rule has no reference to contracts with regard to land. See Rule 150, p. 542, *ante*. See, as to "status," Rules 136—140, pp. 500—513, *ante*.

(u) It may, of course, be invalid on other grounds, *e.g.*, the not being made in due form. See Rule 159, p. 583, *post*.

The authoritative dicta in favour of the *lex domicilii* are strong (v).

"It is a well-recognized principle of law," says the Court of Appeal in *Sottomayor v. De Barros*, "that the question of personal capacity to enter into any contract is to be decided by the law of domicile. . . . As in other contracts, so in that of marriage, personal capacity must depend on the law of domicile" (x).

So, again, in a case the decision of which turned upon the capacity of an Irishwoman, aged 18, and domiciled in Ireland, to bind herself by a contract there made with her future husband whilst she was still an infant under Irish law, Lord Halsbury thus lays down the law as to capacity: "None of these cases [*i.e.*, cases "with reference to dower] relate to the question of incapacity to contract by reason of minority, and the capacity to contract is regulated by the law of domicile. Story has, with his usual precision, laid down the rule (y) that, if a person is under an incapacity to do any act by the law of his domicile, the act when done there will be governed by the same law wherever its validity may come into contestation with any other country: *quando lex in personam dirigitur respiciendum est ad leges illius civitatis quae personam habet subjectam*."

"There is an unusual concurrence in this view amongst the writers on international law. . . . It is said that the familiar exception of the place where the contract is to be performed prevents the application of the general rule. . . . But [an] . . . overwhelming answer is to be found in this, that the argument assumes a binding contract, and if one of the parties was under incapacity the whole foundation of the argument fails" (z).

These dicta lay down the broad rule of English law in reference to contractual capacity (a). A person's capacity to contract

(v) But the authority of these and other dicta in favour of the *lex domicilii* is a good deal shaken, not by the judgment, but by the dicta contained in the judgment of the Court of Appeal in *Ogden v. Ogden*, [1908] P. (C. A.) 46.

(x) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*; and compare *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637, 639, judgment of Stirling, J., and *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 457, judgment of Lord Westbury.

(y) *Conflict of Laws*, s. 64.

(z) *Cooper v. Cooper* (1888), 13 App. Cas. 88, 99, 100, *per Halsbury, C.*

(a) Compare *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637, 639, judgment of Stirling, J.; but contrast the criticisms in *Sottomayor v. De Barros* (1879),

marriage, or to enter into any contract connected with marriage, certainly depends upon the law of his or her domicile at the time of the celebration of the marriage or of the making of the contract (*b*). It is further possible, though not certain, that, as implied in one at least of the dicta already cited, a person's capacity to bind himself by an ordinary contract also depends upon his *lex domicilii* (*c*).

Illustrations.

1. A Portuguese man and a Portuguese woman are first cousins; they reside in England, but are domiciled in Portugal. By the law of Portugal they are under an incapacity to marry one another. They are incapable of intermarriage in England, *i.e.*, their capacity is governed by the law of their domicile (*d*).

2. An Englishwoman, domiciled in England, is an infant. Previously to her marriage she enters with her intended husband, a Frenchman domiciled in France, into a notarial contract made in France dealing with her property according to French law. They intermarry in France. Her capacity to make the notarial contract is governed by English law. As she is an infant, the contract is invalid (*e*).

3. A girl of 18, domiciled in Ireland, is engaged to marry a Scotsman domiciled in Scotland; it is contemplated that they should reside, and they do in fact after their marriage reside, in Scotland. She executes in Ireland an ante-nuptial contract with her intended husband whereby her rights to property after the marriage are regulated. Her capacity to make this ante-nuptial contract is governed by Irish law (*lex domicilii*) (*f*); and as she under such law was, being an infant, incapable of binding herself by a contract not to her advantage, the ante-nuptial settlement is invalid (*g*), *i.e.*, is voidable by her (*h*).

5 P. D. 94, 100, 101, of Sir J. Hannen, on *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; *Ogden v. Ogden*, [1908] P. (C. A.) 46, 73.

(*b*) *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88. See, as to capacity to contract marriage, chap. xxvii., Rules 182, 183, pp. 661, 678, *post*; and note Exception 1, p. 580, *post*.

(*c*) See Exception 1, p. 580, *post*.

(*d*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1.

(*e*) *In re Cooke's Trusts* (1887), 56 L. J. Ch. 637.

(*f*) Note that it is also the *lex loci contractus*. Whether this affects the validity of the contract? Apparently not, according to *In re Bankes*, [1902] 2 Ch. 333.

(*g*) *Cooper v. Cooper* (1888), 13 App. Cas. 88.

(*h*) *Duncan v. Dixon* (1890), 44 Ch. D. 211.

4. In 1844 an Englishwoman married to a French husband, whose domicile is French, enters in England, after her marriage, and therefore when domiciled in France, into a contract with respect to her reversionary interests in trust moneys invested in the English funds. The contract is in substance valid according to French law, but, if governed by English law, is invalid on account of the woman's incapacity to contract. The contract is valid, *i.e.*, the woman's contractual capacity is governed by the law of her domicile (*i*).

5. In 1864 an Englishwoman domiciled in England, when still under 21, marries an Austrian subject domiciled in Austria. Before the marriage they execute a marriage settlement (marriage contract) in the English form. Under Austrian law a husband and wife have a right to revoke their marriage settlement notwithstanding the birth of issue and notwithstanding ratification, and this right of revocation cannot be waived and is not lost by lapse of time. In 1893 the husband and wife exercise their right of revocation and annul the settlement. In 1896 they bring in England an action against the trustees of the settlement, claiming a declaration that the settlement was revoked by the action of the husband and wife in 1893. The revocation is effectual, *i.e.*, the incapacity of the wife as an infant to make a settlement under English law (*lex domicilii*), and her incapacity to make an irrevocable settlement under Austrian law (*lex domicilii* after marriage), make it impossible for the settlement to be valid (*k*).

Exception 1.—A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loci contractus*) (*l*).

(*i*) *Guépratte v. Young* (1851), 4 De G. & Sm. 217.

(*k*) *Viditz v. O'Hagan*, [1900] 2 Ch. (C. A.) 87; and compare *Smith v. Lucas* (1881), 18 Ch. D. 531.

(*l*) See *Male v. Roberts* (1799), 3 Esp. 163; *Stephens v. McFarland* (1845), 8 Ir. Eq. Rep. 444; *Re D'Orleans* (1859), 1 Sw. & Tr. 253; *Guépratte v. Young* (1851), 4 De G. & Sm. 217; *Simoin v. Mallac* (1860), 29 L. J. P. & M. 97, 99; *Sottomayor v. De Barros* (1879), 5 P. D. 94, 100, 101, language of Sir J. Hannen; *Ogden v. Ogden*, [1908] P. (C. A.) 46. *M'Feetridge v. Stewarts, Ltd.*, [1913] S. C. 773, Ct. of Session, supports this, and follows *Male v. Roberts* (1799), 3 Esp. 163.

Compare especially Foote (4th ed.), pp. 69, 70, and Westlake, pp. 43—48.

Comment.

“It has been doubted whether the personal competency or
“incompetency of an individual to contract depends on the law
“of the place where the contract is made, or on the law of the
“place where the contracting party is domiciled. Perhaps in this
“country the question is not finally settled, though the prepon-
“derance of opinion here, as well as abroad, seems to be in favour
“of the law of the domicile. It may be that all cases are not to
“be governed by one and the same rule” (*m*).

These words exactly express the doubt which exists as to the law governing a person's contractual capacity. On the one hand, it appears to be established that, in accordance with Rule 158 (*n*), capacity to marry or to enter into a contract connected with marriage depends on the *lex domicilii* of the contracting party; and it is further clear that the language judicially used in *Sottomayor v. De Barros* (*o*) implies that a person's *lex domicilii* governs his capacity to enter into any contract whatever. On the other hand, there are strong grounds for holding that capacity to enter into an ordinary mercantile contract, *e.g.*, for a loan or for the purchase or sale of goods, is governed, not by the *lex domicilii* of the contracting party, but by the law of the place where the contract is made (*lex loci contractus*). Story certainly holds to this opinion (*p*). In one reported case, where the point is distinctly raised though not precisely decided, Lord Eldon held, in regard to a contract made by an English infant in Scotland, that the effect of infancy, as a defence to an action on the contract, depended upon the law of Scotland. To this may be added that to allow the validity of an ordinary contract made in England by a person domiciled abroad to depend upon the law of his domicile would often lead to inconvenience and injustice. It would certainly be strange if an Englishman of the age of 24, who happened to be domiciled in a country where the age of majority is fixed at 25, could escape liability for the price of goods bought by him from a tradesman in London by pleading that he was a minor under the law of his foreign domicile and not

(*m*) *Cooper v. Cooper* (1888), 13 App. Cas. 88, 108, per Lord Macnaghten. Compare Lord Watson, p. 105.

(*n*) See p. 577, *ante*; and see further, as to capacity to marry, chap. xxvii., Rules 182, 183, pp. 661, 678, *post*.

(*o*) See pp. 578, 579, *ante*.

(*p*) See Story, s. 82; *Saul v. His Creditors* (1827), 5 Mar. N. S. 569, 596—598.

liable for the price of the goods. Similar considerations apply to the case of a married woman.

Illustrations.

1. X, an infant domiciled in England, is, when in a foreign country, arrested for a debt there incurred. A pays it for him. A brings an action against X in England for the money so paid. *Seem*, X's capacity to incur the debt to A is governed by the law of the foreign country (q).

2. X, an infant domiciled in England, enters, when in Scotland, into a contract to serve A, a domiciled Scotsman, for six months. X's capacity to enter into the contract is (*seem*) governed by the law of Scotland (q).

3. X, a man of 21, is an Englishman residing in England. He is domiciled in a foreign country where minority lasts till the age of 22. He incurs a debt to a tradesman in England which he is not capable of incurring under the law of his domicile. He is sued for the debt in England. His capacity to contract, and therefore his liability for the debt, is (*seem*) determined by the law of England (r).

4. X, a man of 18, domiciled in Russia, accepts [in England?] a bill of exchange. An infant is not capable of binding himself by a bill of exchange according to the law of England. X's

(q) Compare *Male v. Roberts* (1799), 3 Esp. 163; 6 R. R. 823. "It appears from the evidence in this case, that the cause of action arose in Scotland; the contract must be, therefore, governed by the laws of that country where the contract arises. Would infancy be a good defence by the law of Scotland, had the action been commenced there?" 3 Esp. 164; 6 R. R. 823, per Eldon, C.

"The law of the country where the contract arose must govern the contract; and what that law is, should be given in evidence to me as a fact. No such evidence has been given; and I cannot take the fact of what that law is, without evidence." 3 Esp. 164, 165; 6 R. R. 824.

In *Male v. Roberts* the domicile of the infant is not stated, but, *seem*, was English. Illustration 1 gives the facts in *Male v. Roberts*; nor does it seem that, if a similar case should now arise, the result would be affected by the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1, which cannot be assumed to have any extra-territorial operation; which (unlike s. 2) does not deal with procedure; and which, moreover, expressly saves the validity of any contract into which an infant might by the rules of common law or equity enter. Illustration 2 is suggested by *Male v. Roberts*, and clearly does not fall within the Infants' Relief Act.

(r) See for a case of this kind brought before the French Courts, *Pellin Ferron v. Santo Venia*, *Journal du Droit International Privé*, v., p. 502; and compare Bar (Gillespie's transl., 2nd ed.), ss. 133—144, especially s. 142.

capacity to accept the bill (*semble*) is governed by the law of England, and he is not liable on the bill (*s*).

5. *A*, an Irishman domiciled in Ireland, is an infant under 21. He takes service as a labourer in Scotland with *X*. He is injured by an accident in the course of his employment. He agrees, without consulting anyone, to accept compensation under the Workmen's Compensation Act, 1906. After compensation has been paid and accepted, *A* brings an action in Scotland claiming damages at common law, and alleges that, as an infant, he is not bound by the agreement. *A*'s capacity must be determined not by the *lex domicilii* (Irish law), but by the *lex loci contractus* (Scottish law) (*t*).

Exception 2.—A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs* (*u*).

(*ii*) *Form.*

RULE 159 (*x*).—Subject to the exceptions hereinafter mentioned, the formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*).

(1) Any contract is formally valid which is made in accordance with any form recognized as valid by the law of the country where the contract is made (which form is, in this Digest, called the local form) (*y*).

(2) No contract is valid which is not made in accordance with the local form (*z*).

(*s*) Suggested by *In re Soltykoff*, [1891] 1 Q. B. (C. A.) 413. The case is very briefly reported, and the infant's domicile is not stated. But it seems to have been assumed that his liability in any case depended on the law of England. Compare Chalmers, Bills of Exchange (8th ed.), pp. 70—72.

(*t*) *M'Feetridge v. Stewarts, Ltd.*, [1913] S. C. 773, Ct. of Sess.

(*u*) See pp. 542, 544, *ante*, as to the limits of this doctrine; and App., Note 20.

(*x*) Westlake, ss. 207—210; Foote, pp. 349—357; Story, ss. 260—262 *a*.

(*y*) *Compton v. Bearcroft* (1769), 2 Hagg. Cons. 430; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54; *Leroux v. Brown* (1852), 12 C. B. 801, 824, judgment of Jervis, C. J.; *Brinkley v. Attorney-General* (1890), 15 P. D. 76.

(*z*) *Bristow v. Sequeville* (1850), 19 L. J. Ex. 289; 5 Ex. 275; *Alves v. Hodgson* (1797), 7 T. R. 241; *Clegg v. Levy* (1812), 3 Camp. 166; *Trimbey v.*

Comment.

The one principle of English law with regard to the law regulating the form of a contract, or the formalities in accordance with which a contract is made, is that the form depends, both affirmatively and negatively, upon the law of the country where the contract is made (*lex loci contractus*). "The formalities required for "a contract by the law of the place where it was made, the *lex loci contractus celebrati*, are sufficient for its external validity in "England" (a), and "the formalities required for a contract by "the law of the place where it was made, the *lex loci contractus celebrati*, are also necessary for its validity in England" (b).

Any difficulty which may arise in the application of this principle is generally due (c) to one of two causes, neither of which has any special relation to the principles of private international law: first, there may be a doubt as to what is the place where a given contract is finally completed or made; thus if X, living in England, enters into a contract with A, living in Germany, by letters sent through the post, there may be a doubt whether the contract is to be considered as made in England, and subject, therefore, as to its form, to the law of England, or made in Germany, and subject, therefore, as to its form, to the law of Germany; secondly, it is in some cases hard to determine whether a given formality, *e.g.*, the necessity for a stamp, belongs to the form of a contract, in which case it is governed by the law of the place where the contract is made, or to the evidence of a contract, in which case the necessity for the stamp is a matter of procedure, and is governed, not by the law of the country where the contract is made (*lex loci contractus*), but by the law of the country where an action on the contract is brought, or, speaking more generally, where legal proceedings are taken to enforce the contract (*lex fori*).

The general rule, however, whatever the difficulties in its application, is clear. A contract made in one country (*e.g.*, France), even though performable in another (*e.g.*, England), is, as far as its form goes, valid in England if made in a manner required or permitted by French law, and is invalid in England if not made

Vignier (1834), 1 Bing. N. C. 151; *Benham v. Mornington* (1846), 3 O. B. 133; *Kent v. Burgess* (1840), 11 Sim. 361; *In re Estate of M'Loughlin* (1878), 1 L. R. Ir. (Ch.) 421.

(a) Westlake (5th ed.), s. 207.

(b) *Ibid.*, s. 209.

(c) A nice question may also be raised as to the extension to be given to the idea of the "form" of a contract. Does it include, for example, consideration?

in a manner required or permitted by the law of France, and this is so even though the contract be made in the form required by English law for the validity of a contract of the same kind when made in England.

Illustrations.

1. An Englishman passes four weeks in Scotland (*d*); marries an Englishwoman, who has only just arrived in Scotland, by mere declaration before witnesses. The marriage is in a form allowed by the law of Scotland. The marriage is valid (*e*).

2. An Irishman temporarily resident in Japan marries a Japanese woman in Japan according to the forms required by the law of the country. The marriage is valid (*f*).

3. An Englishman and an Englishwoman domiciled in England are married in accordance with the ceremonies of the Church of England in Belgium. The solemnization of the marriage does not follow the form required by the law of Belgium. The marriage is invalid (*g*).

4. X and A enter, in a foreign country, into a contract, which is there void for want of a stamp. The contract is invalid (*h*).

Exception 1 (i).—The formal validity of a contract with regard to an immovable depends upon the *lex situs* (?).

(*d*) See 19 & 20 Vict. c. 96.

(*e*) See *Compton v. Bearcroft* (1769), 2 Hagg. Cons. 430; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54. Contrast *Lawford v. Davies* (1878), 4 P. D. 61. See chap. xxvii., Rule 182, p. 666, *post*; *Leroux v. Brown* (1852), 12 C. B. 801, 824, judgment of Jervis, C. J. See Story, ss. 260—262. The principle, that the formal validity of a contract depends in general upon the observance of the local form, is specially well illustrated by the decisions with regard to the validity of a marriage made in a foreign country. The truth is that the strict adherence of English Courts to the rule, that the form of a contract is governed by the *lex loci contractus*, arises in a great degree from the fact that the earliest English decisions on the subject had reference to the contract of marriage. See App., Note 5, "Preference of English Courts for *Lex loci contractus*."

(*f*) *Brinkley v. Attorney-General* (1890), 15 P. D. 76. See chap. xxvii., Rule 182, p. 661, *post*.

(*g*) *Kent v. Burgess* (1840), 11 Sim. 361.

(*h*) *Bristow v. Sequerille* (1850), 5 Ex. 275; 19 L. J. Ex. 289. Compare *Alves v. Hodgson* (1797), 7 T. R. 241.

(*i*) See pp. 544—546, *ante*; *Adams v. Clutterbuck* (1883), 10 Q. B. D. 403; *Bank of Africa v. Cohen*, [1909] 2 Ch. (C. A.) 129. Compare Baty, *Polarized Law*, pp. 80—82. The Exception must be read subject to the observations on Rule 150, pp. 545, 546, *ante*, and is not applicable to contracts not intended to operate as conveyances, such as equitable mortgages over foreign lands. See also App., Note 20.

Exception 2 (k).—A contract made in one country in accordance with the local form (*l*) in respect of a movable situate in another country may possibly be invalid if it does not comply with the special formalities (if any) required by the law of the country where the movable is situate at the time of the making of the contract (*lex situs*).

Comment.

The law of a country (*e.g.*, of France) where a movable is situate may require for the validity of any contract with regard to such movable that it should be made in a particular form, *e.g.*, be in writing or be registered. In this case it is possible, though not certain, that such a contract, though made in another country (*e.g.*, in England), would be held by an English Court invalid if it did not conform to the formalities required by the law of France. The subject, however, is one on which there is a want of authority (*m*), and the consideration of it is complicated by the fact that a contract with regard to a movable is often not only a contract but also an assignment. It is, however, pretty certain that a contract, as contrasted with a conveyance, with regard to land or immovables may be valid even if it does not comply with the forms, if any, required for its validity by the *lex situs* (*n*), and the increasing tendency of English decisions clearly is to diminish the distinction between the rules governing rights over immovables and the rules governing the rights over movables when situate in a foreign country.

Exception 3.—Possibly a contract made in one country, but intended to operate wholly in, and to be subject to the law of, another country, may be valid, even though not made in accordance with the local form, if it be made in accordance with the form required, or allowed, by the law of the country where the

(*k*) *Robinson v. Bland* (1760), 2 Burr. 1077. Compare Rule 154, *Exception*, p. 570, *ante*.

(*l*) For meaning of "local form," see Rule 159, p. 583, *ante*.

(*m*) See, however, *Smelting Co. of Australia v. Commissioners of Inland Revenue*, [1897] 1 Q. B. (C. A.) 175, which, so far as it goes, does not support the *Exception*.

(*n*) See Rule 150, pp. 545, 546, *ante*.

contract is to operate, and subject to the law whereof it is made (?) (o).

Comment.

It has been suggested that "if a contract is intended by the parties thereto to be an English contract and transaction, or a contract and transaction of any other country [than the country in which it is made], it will be a good contract and enforceable in England if it complies with the formalities required, if so intended to be an English contract, by the law of England, or, if so intended to be a contract of some other country, with the formalities required by the law of such country" (p).

This suggestion of Mr. Nelson's cannot be supported by adequate authority, but it is in itself reasonable, and falls in with the tendency (q) of English Courts to refer every question connected with a contract to the law by which the parties intended the contract to be governed. There are, moreover, one or two cases which are best explained by admitting this possible exception to Rule 159 (r).

Illustrations.

A Frenchman domiciled in France marries an Englishwoman resident in France, but domiciled in England. The marriage takes place in France. Before the marriage a settlement is executed by the parties in France of movable property of the woman in England. The settlement is made according to the form and in the manner required by the law of England, but not in conformity with the formalities required by the law of France. If governed by the law of France, the settlement would be void; if governed by the law of England, the settlement would be valid. The settlement is valid (s).

(o) The Exception has normally no application, even if valid, to marriage, which must be contracted under the *lex loci*. But it is exemplified by marriages contracted under the authority of the Foreign Marriage Act, 1892. See Rule 182, p. 662, *post*.

(p) See Nelson, pp. 257, 258.

(q) See, e.g., *Re Marseilles Extension Co.* (1885), 30 Ch. D. 598; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321.

(r) "With regard to form, it may be that a contract for the employment of a ship, which has been effectually made according to the law of her flag, would be considered valid although not completed with all the forms required by the law of the place of the contract." Carver, *Carriage by Sea*, s. 213. See *Van Grutten v. Digby* (1862), 31 Beav. 561; 32 L. J. Ch. 179.

(s) *I.e.*, in England. *Van Grutten v. Digby* (1862), 31 Beav. 561; 32 L. J. Ch. 179.

"I hold it to be the law of this country that if a foreigner and English-

Exception 4.—In certain cases a bill of exchange may be treated as valid, though it does not comply with the requirements, as to form, of the law of the country where the contract is made (*t*).

(iii) *Essential Validity.*

RULE 160(*u*).—The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law (*x*) of the contract.

Comment.

A contract, though made by persons competent to contract (*y*), and though formally valid (*z*), may nevertheless, on account of

“woman make an express contract previous to marriage, and if on the faith of that contract the marriage afterwards takes place, and if the contract relates to the regulation of property within the jurisdiction and subject to the laws of this country, then and in that case this Court will administer the law on the subject as if the whole matter [including the formal validity of the contract] were to be regulated by English law.” Per Romilly, M. R., 31 Beav. p. 567. *In re Bankes*, [1902] 2 Ch. 333: a marriage contract made in Italy between an Englishwoman and a domiciled Italian is valid, because intended to operate in England, though its form and substance contravene Italian law; *Viditz v. O'Hagan*, [1899] 2 Ch. 569 (reversed on another point, [1900] 2 Ch. 87).

(*t*) See chap. xxvi., Rule 172, (1) (a) and (b) pp. 635, 636, *post*, and Bills of Exchange Act, 1882, s. 72. See also Rule 156, p. 573, *ante*.

(*u*) *Robinson v. Bland* (1760), 2 Burr. 1077; *Santos v. Illidge* (1860), 8 C. B. (N. S.) 861 (Ex. Ch.); *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The Gaetano* (1882), 7 P. D. (C. A.) 137; *Chartered Bank of India v. Netherlands Co.* (1882), 9 Q. B. D. 118; (1883), 10 Q. B. D. (C. A.) 521; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321; *The August*, [1891] P. 328; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Shrickand v. Lacon* (1906), 22 T. L. R. 245; *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888; *In re Bonacina*, [1912] 2 Ch. 394: a foreign contract may be sued upon in England if valid by the proper law, though made without consideration.

Compare Westlake, ss. 212—214; Nelson, pp. 261—266; Foote, pp. 358—369. Rule 160 agrees, we think, in substance with the view of Westlake and Nelson, but not with that of Foote. See App., Note 22, “What is the Law determining the Essential Validity of a Contract?”

(*x*) For the meaning of “proper law of a contract,” see Rule 155, p. 572, *ante*; and see Rule 161, p. 602, *post*, and Sub-Rules thereto, pp. 606—615, *post*. For a valuable statement of the limits (often neglected) within which the proper law of a contract, or, in other words, the intention of the contracting parties, can affect its validity, see Pillet, *Principes de Droit International Privé*, ch. xv., “Le principe d'autonomie de la volonté.”

(*y*) See Rule 158, p. 577, *ante*.

(*z*) See Rule 159, p. 583, *ante*.

something in the nature of the contract itself, be wholly or partially invalid. It may, that is to say, be a contract to which, on account of its terms or of its nature, the law refuses to give effect. It then lacks "essential" or "material" validity (*a*).

This defect may arise from the contract being strictly unlawful, *i.e.*, from its being one which the law actually forbids; such, under the law of England, is a contract for the promotion of the slave trade, or a contract which, as being tainted with champerty or maintenance, tends to pervert the due course of justice (*b*). The defect, again, may arise from the contract being one which, though not strictly forbidden, is made void or voidable by law; such, under the law of England, is a gratuitous promise, when not made under seal, and such is a contract in restraint of trade.

The laws, however, of different countries differ as to the contracts which they render invalid. Thus, a contract by a solicitor to conduct an action on the terms of sharing the damages (if any) which are recovered, though void under the law of England (*c*), may be perfectly valid under the law of a foreign country, and a gratuitous promise, though as a rule void under the law of England, is legally binding under the law of many foreign countries.

When, therefore, a contract contains any foreign element (*i.e.*, whenever there is a possible choice of law), the question may arise, What is the law which governs the material validity of the contract? The reply to this inquiry is admittedly open to some doubt, but the answer to be drawn from the reported decisions of English Courts is (it is submitted) given in Rule 160. The essential validity of a contract is, subject to very wide exceptions, indirectly at any rate, determined by the proper law of the contract (*d*), that is, by the law or laws to which the parties when contracting intended, or may fairly be presumed to have intended, to submit themselves. The same conclusion may be put in a different shape, and be expressed in terms more nearly corresponding with the language used by English judges. When the question arises whether a given contract or part of a given contract, made in one country (*e.g.*, England), and to be performed wholly

(*a*) The same sort of invalidity may, of course, exist in the case of instruments which are not contracts—*e.g.*, wills.

(*b*) See *Bradlaugh v. Newdegate* (1882), 11 Q. B. D. 5; *Rees v. De Bernardy*, [1896] 2 Ch. 447; Pollock, *Contracts* (8th ed.), p. 413.

(*c*) *Grell v. Levy* (1864), 16 C. B. (N. S.) 73.

(*d*) For the meaning of "proper law of the contract," see Rule 155, p. 572, *ante*.

or partially in another (*e.g.*, France), is or is not valid, our Courts are accustomed to consider whether the contract is an "English contract" (*e*) or a "French contract." If it is an "English contract," they hold that its validity is in general governed by the law of England; if it is a "French contract," they hold that its validity is in general governed by the law of France. But the answer to the question whether a given agreement is to be considered an English contract or a French contract, though in the eyes of English judges it does not depend exclusively upon any one circumstance (*e.g.*, the place where the contract is made, or the place where the contract is to be performed) (*f*), does depend upon the intention of the parties as to the law by which the contract is to be governed, or, in other words, upon the proper law of the contract (*g*).

Considerations limiting effect of Rule.—This statement, that the proper law of a contract determines its material validity, must be taken subject to the following limitations:—

First. The intention which determines the proper law, and therefore in general (*h*) the validity, of a contract, is the intention of the parties (exhibited usually by their conduct and the nature of the agreement) actually and in fact to contract with reference to the law of a given country, *e.g.*, England.

This intention is a quite different thing from the intention, which, in the absence of fraud or the like, must always exist, that a contract shall be valid; it is a different thing also from the intention that a contract made in fact under the law of one country shall, as to its validity, be governed by the law of some other country. This is clearly a result which cannot be effected by the will of the parties (*i*).

(*e*) It is usual and convenient to describe a contract as the contract of the country which supplies its proper law. Thus, an "English contract" means a contract which the parties intend to be governed by the law of England. A "French contract" means a contract which the parties intend to be governed by the law of France.

(*f*) See *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

(*g*) See App., Note 22, "What is the Law determining the Essential Validity of a Contract?"

(*h*) See Exceptions 1—3, pp. 593—601, *post*, for cases where the validity of a contract does not depend upon its proper law.

(*i*) As to the determination of the proper law of a contract, see Sub-Rules to Rule 161, pp. 606—615, *post*. See also App., Note 22, "What is the Law determining the Essential Validity of a Contract?" A contract, be it noted, may, as to some of its terms, be governed by the law of one country (*e.g.*,

Secondly. The “proper law” of a contract is, in a great number of instances, the law of the country where the contract is to be performed (*lex loci solutionis*). The assertion, therefore, of many writers, that the essential validity of a contract is governed by the law of the place of performance, does not in its results differ greatly from our Rule.

Thirdly. The exceptions to Rule 160 are of some importance as limiting the application of the principle that the essential validity or legality of a contract is determined by its proper law.

Illustrations.

1. In 1858 X, a British subject domiciled in England, makes in Brazil a contract, then lawful by the law of Brazil, for the sale to A, a Brazilian domiciled in Brazil, of slaves who, under the law of Brazil, are lawfully held there by X. The contract is to be performed in Brazil. Brazilian law is the proper law of the contract. The contract is held in England lawful and valid (*k*).

2. A lends money to X at Monte Carlo to gamble at the public tables. Gambling is permitted by the law of Monte Carlo. The law of Monte Carlo is the proper law of the contract. The contract is valid (*l*).

3. By a charter-party entered into at Boston, Mass., by X & Co., a company incorporated in England, with A for the shipment of cattle in an English ship to England, it is provided (*inter alia*) that “X & Co. shall not be liable for negligence of master or crew.” Such provision is valid by English law (law of flag), but is invalid by the law of Massachusetts. Cattle are injured on the coast of Wales through negligence of master or crew. English law is the proper law of the contract. The provision is valid, and X & Co. are not liable for the damage (*m*).

4. A bond is made by X, the master of a foreign ship, hypothecating cargo laden on board the ship. The bond is valid according to its proper law, *i.e.*, the law of the country to which the ship

England), and as to others by the law of another country, *e.g.*, Scotland; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Crosland v. Wrigley* (1895), 70 L. T. (C. A.) 327.

(*k*) *Santos v. Illidge* (1860), 8 C. B. (N. S.) 861; 29 L. J. C. P. 348.

(*l*) *Quarrier v. Colston* (1842), 1 Phillips, 147; *Saxby v. Fulton*, [1909] 2 K. B. (C. A.) 208. To permit the enforcement of such contracts in England is not against public policy, as was suggested by Cozens-Hardy, L. J., in *Moules v. Owen*, [1907] 1 K. B. (C. A.) 746, 756.

(*m*) *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, and (C. A.) 330.

belongs, but is not valid according to English law. The bond is valid in England, *i.e.*, its validity is determined in accordance with its proper law (*n*).

5. *X*, an Italian subject trading in England, becomes bankrupt in England and obtains his discharge in 1901. *X* at the time of the discharge is indebted to *A*, also an Italian subject. *X*'s debt to *A* was not revealed in the bankruptcy proceedings which were unknown to *A*. In 1906, after the discharge, *X* signs in Italy a private document (*privata scrittura*) whereby *X* undertakes to pay the debt to *A*. In 1908 *X* dies. *A* claims to prove under the bankruptcy. The promise under the private document to pay the debt was under English law void for want of consideration. Under Italian law it was valid. Italian law was held by the High Court to be the proper law of the contract, and *X* was entitled to prove for the debt (*o*).

6. In 1892 *X*, residing in Scotland, enters in England into a contract with *A*, which is to be performed, as to most of its terms, in Scotland. The contract contains this clause: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." The clause is then void under the law of Scotland, but valid under the law of England. The law of England is, as regards the arbitration clause, the proper law of the contract, and the arbitration clause is valid (*p*).

7. *X* and *A* are Scotsmen domiciled in Scotland. They are sailing on Loch Katrine. The boat capsizes, and *A* saves *X*'s life at the risk of his own. *X*, soon afterwards, and without any other consideration than that of gratitude, promises *A* in writing to pay him 1,000*l*. *X* has property both in England and in Scotland. He goes to England and refuses to pay the 1,000*l*. If the contract is governed by Scottish law it is valid, and *X* is liable to pay the 1,000*l*. If it is governed by English law, the contract is void, and *X* is not liable to pay the 1,000*l*. *Semble* (*q*), the law of Scotland

(*n*) *The Gaetano* (1882), 7 P. D. (C. A.) 137. See further, chap. xxvi., Rule 166, p. 622, and Sub-Rule, p. 625, *post*.

(*o*) *In re Bonacina*, [1912] 2 Ch. (C. A.) 394.

(*p*) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202. This is a particularly strong case, as it was decided by the House of Lords, when sitting as a Scottish Court of Appeal, with regard to an action brought in Scotland. See also *Spurrier v. La Cloche*, [1902] A. C. 446: English law is applicable to a contract of fire assurance entered into in Jersey by the agent of an English company.

(*q*) There is no reported case known to us deciding the points raised in Illustrations 6 to 8, but there is authority for the statement that a contract

is the proper law of the contract and the contract is valid, *i.e.*, X is in England, as in Scotland, liable to an action for the 1,000*l.*

8. X and A are Englishmen domiciled in England, but travelling for a week's tour in Scotland. A, in Edinburgh, saves X's life at the risk of his own, and X soon afterwards, and whilst in Scotland, promises A in writing to pay him 1,000*l.* as a mark of X's gratitude. They both return to England. X refuses to pay the 1,000*l.* The law of England (*semble*) is the proper law of the contract, and the contract is invalid, *i.e.*, X is not liable in England to an action for the 1,000*l.* (r).

9. X and A, Scotsmen domiciled in Scotland, are travelling for a week's tour in England. A, in London, saves X's life at the risk of his own, and X soon afterwards, and whilst in England, promises A in writing to pay him 1,000*l.* as a mark of X's gratitude. X later refuses to pay the 1,000*l.* Whether the proper law of the contract is the law of Scotland or the law of England, and whether the contract is valid or not?

Exception 1 (s).—A contract (whether lawful by its proper law or not) is invalid (t) if it, or the enforcement thereof, is opposed to English interests of State, or to the policy of English law, or to the moral rules upheld by English law.

Comment.

English Courts cannot be used to enforce contracts which violate English law, or which are opposed to English interests of State, to the general policy of English law, or, if we may use a very vague

which would be void for want of consideration if it were an English contract will, if made abroad and performable in a foreign country under the law of which it is valid, support an action in England. *Scott v. Pilkington* (1862), 2 B. & S. 11; 31 L. J. Q. B. 81; *In re Bonacina*, [1912] 2 Ch. (C. A.) 394. In the American case, *Pritchard v. Norton* (1882), 106 U. S. 124, a guarantee bond, entered into in New York, and if governed by New York law invalid for lack of consideration, was enforced because it was held that its validity must be determined by the law of Louisiana, which governed the transaction guaranteed. See 2 Beale, Cases on the Conflict of Laws, p. 288.

(r) Nor, *semble*, in Scotland.

(s) See especially, Nelson, p. 261, and Intro., General Principle No. II. (B), p. 34, *ante*.

(t) *I.e.*, in England.

D.

term, to the morality upheld by English law (*u*). This principle has thus been stated with reference to a particular case:—

It has been “insisted that, even if the contract was void by the “law of England as against public policy, yet, inasmuch as the “contract was made in France, it must be good here, because the “law of France knows no such principle as that by which unreasonable contracts in restraint of trade are held to be void in this “country. It appears to me, however, plain on general principles “that this Court will not enforce a contract against the public “policy of this country, wherever it may be made. It seems to “me almost absurd to suppose that the Courts of this country “should enforce a contract which they consider to be against “public policy, simply because it happens to have been made “somewhere else” (*x*).

Illustrations.

1. *X*, in England, contracts with *A* for loans to assist the subjects of a foreign State to carry on a rebellion against the sovereign of such State, who is then in amity with the British Crown. The contract is opposed to English interests of State and invalid (*y*).

2. *X*, a Frenchman, contracts with *A*, also a Frenchman, in France, for the supply of money to raise a rebellion in Crete against the Greek Government, then in amity with the British Crown. The enforcement of the contract (*semble*) is opposed to English interests of State, and the contract is invalid.

3. *X* in France enters into an agreement with *A* that *A* shall conduct an action for *X* in England, on the terms of *A* being paid for his work by a share of the damages, if any, to be recovered by *X* in the action. Such an agreement is lawful by the law of

(*u*) See on this point, Pollock, *Contracts* (8th ed.), chap. vii.; Foote (4th ed.), pp. 359—362.

(*x*) *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 369, judgment of Fry, J.

(*y*) *De Wütz v. Hendricks* (1824), 2 Bing. 314. “It [is] contrary to the law “of nations (which in all cases of international law is adopted into the municipal “Code of every civilized country) for persons in England to enter into engagements to raise money to support the subjects of a Government in amity with “our own, in hostilities against their Government, and . . . no right of “action could arise out of such a transaction.” *Ibid.*, 315, 316, judgment of Best, C. J. Compare *Thompson v. Barclay* (1828), 6 L. J. Ch. 63; *Taylor v. Barclay* (1828), 2 Sim. 213; *Jones v. Garcia del Rio* (1823), T. & R. 297; *Macnamara v. D’Evreux* (1824), 3 L. J. Ch. 156; *Macgregor v. Lowe* (1824), 1 C. & P. 200.

France. The contract is opposed to the policy of English law and invalid (*z*).

4. In 1857 a husband and wife, British subjects, are domiciled in France. They enter in France into an agreement for the collusive conduct of a divorce suit in England, and for the abandonment by the husband of the custody of his children. The agreement, whether valid by the law of France or not, is opposed to the moral rules upheld by English law and invalid (*a*).

5. *X* contracts with *A*, a courtesan, for the price of her prostitution. The contract is lawful in the foreign country where it is made and is to be performed. It is opposed to the moral rules upheld by English law and invalid (*b*).

6. *H*, a Frenchman domiciled in France, misappropriates in France moneys of *A*, also domiciled in France. *X*, the wife of *H*, by an agreement made in France, and intended by the parties to be wholly performed in France, agrees to pay *A* by instalments out of her own money the amount so misappropriated by *H*, upon the terms of *A* abstaining from prosecuting *H* in France. The agreement is lawful and valid under French law. It is opposed to the moral rules upheld by English law and invalid (*c*).

Exception 2.—A contract (whether lawful by its proper law or not) is invalid if the making thereof is unlawful by the law of the country where it is made (*lex loci contractus*) (?) (*d*).

(*z*) *I.e.*, in England. See *Grell v. Levy* (1864), 16 C. B. (N. S.) 73.

(*a*) *Hope v. Hope* (1857), 8 De G. M. & G. 731.

Part at least of the agreement is unlawful by the law of the country where it is to be performed. Pollock, p. 412.

(*b*) See *Robinson v. Bland* (1760), 2 Burr. 1077, 1084, dictum of Wilmut, J.; Pollock, p. 410. Compare *Strauss v. Platt* (1921), *The Times*, June 8, 1921. A contract for the supply of goods to a courtesan cannot be enforced in England. See *Pearce v. Brooks*, L. R. 1 Ex. 213; *Upfill v. Wright*, [1911] 1 K. B. 506.

(*c*) *I.e.*, in England. See *Kaufman v. Gerson*, [1904] 1 K. B. (C. A.) 591. The decision of the Court of Appeal (which reverses the judgment of Wright, J., [1903] 2 K. B. 114) is open to criticism. See App., Note 3, "Case of *Kaufman v. Gerson*"; and compare *Société des Hôtels Réunis v. Hawker* (1914), 30 T. L. R. (C. A.) 423. See also *Saxby v. Fulton*, [1909] 2 K. B. 208; *Dynamit Aktiengesellschaft v. Rio Tinto Co.*, [1918] A. C. 260, 298, judgment of Lord Atkinson; *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1921), 37 T. L. R. (C. A.) 777, 783. It is not contrary to public policy to give effect to a provision of a Scottish marriage settlement providing a purely alimentary provision for a husband. *In re Fitzgerald*, [1904] 1 Ch. (C. A.) 573.

(*d*) See Foote, pp. 362, 363, with which contrast Nelson, p. 266. Compare Intro., General Principle No. I., p. 23, *ante*, and General Principle No. II. (C), p. 34, *ante*.

Comment.

"I put aside," says Lord Halsbury, ". . . questions in which the positive law of the country forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it" (e).

"The question of legality may arise," writes Mr. Foote (f), "with reference to the contracting of the agreement, and not to its performance. The consideration, on one side or the other, may either be an unlawful thing in itself to exchange for any promise, or unlawful with reference to the particular promise for which it is given. There is no authority for saying that the question of legality, in such cases as these, is determined by any other law than that of the place where the contract is entered into, except the dictum in *Robinson v. Bland*" (g). If these statements of the law are to be trusted, no contract is valid the *making whereof* is unlawful by the law of the country where a contract is made (*lex loci contractus*).

Exception 2, however, does not apply to the numerous class of cases where it is not the *making* of a contract, but the *performance* thereof in a given country which is there illegal (h). The exception, further, itself, though sound in principle, does not rest on an unassailable foundation of authority (i).

(e) *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 336, per Halsbury, C.

(f) Foote, p. 362.

(g) 2 Burr. 1078.

(h) Compare Wharton, ss. 486, 487.

(i) "It does not serve to invalidate a contract, the law of the obligation of which is to be sought in some other country, that it is illegal and void in substance by the law of the place where it is made." Nelson, p. 266. If, as would appear at first sight, these words are meant to contradict the principle laid down in Exception 2, we cannot agree with Mr. Nelson's statement of the law. But it is very probable that he refers to the illegality of the *performance* of a contract at the place where it is made, and not to the illegality of the *making* of it there. If so, he may not disagree with the view embodied in Exception 2. As to marriage, compare Rule 182, Exception 2, p. 677, *post*.

Lee v. Aday (1886), 17 Q. B. D. 309, would be an illustration of this Exception if the Court had treated the proper law of the contract of insurance, the contract of assignment of which was held invalid under the law of the place where it was made as being English law as held in *Le Feuvre v. Sullivan* (1855), 10 Moore, P. C. 1. Compare p. 566, *ante*.

Illustration.

X and A contract for the sale and delivery in England by X to A of spirituous liquors. The contract is made in a foreign country where it is unlawful not only to sell spirituous liquors, but to contract for their sale. The parties are Englishmen domiciled in England. Such a contract may be unlawful and invalid in England, but this is doubtful (*k*).

Exception 3 (l).—A contract (whether lawful by its proper law or not) is, in general, invalid in so far as

- (1) the performance of it is unlawful by the law of the country where the contract is to be performed (*lex loci solutionis*); or
- (2) the contract forms part of a transaction (*m*) which is unlawful by the law of the country where the transaction is to take place.

This exception (*semble*) does not apply to any contract made in violation, or with a view to the violation, of the revenue laws of any foreign (*n*) country not forming part of the British dominions (*o*).

(*k*) See App., Note 22, "What is the Law determining the Essential Validity of a Contract?"

(*l*) Foote (4th ed.), pp. 358—362. Compare Westlake (5th ed.), ss. 212—215; *Robinson v. Bland* (1760), 2 Burr. 1077, 1078; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 369. Compare Intro., General Principle No. II. (C), p. 34, *ante*; and see App., Note 22.

"An obligation is invalid everywhere if the transaction which constitutes the "subject of the obligation is an act which is forbidden at the place that is "selected as, or is necessarily presumed to be, the place of performance." Bar (Gillespie's transl., 2nd ed.), p. 557.

Ertel Bieber & Co. v. Rio Tinto Co., [1918] A. C. 260; *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888; *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. (C. A.) 287; *Dampskibsactieselskapet Aurdal v. Compania de Navegacion La Estrella*, [1916] S. C. 882.

(*m*) *Biggs v. Lawrence* (1789), 3 T. R. 454; *Clugas v. Penaluna* (1791), 4 T. R. 466; *Waymell v. Read* (1794), 5 T. R. 599; 2 R. R. 675; *Lightfoot v. Tenant* (1796), 1 B. & P. 552. Compare Leake, *Law of Contracts* (6th ed.), pp. 558—560; Pollock, *Principles of Contract* (8th ed.), pp. 338, 339.

(*n*) "Foreign" in this Digest means not English (see pp. 67, 71, *ante*). Hence a country such as Victoria, which forms part of the British dominions, is a foreign country. For meaning of "country," see pp. 67, 69—71, *ante*. For meaning of "British dominions," see p. 68, *ante*.

(*o*) *Planché v. Fletcher* (1779), 1 Doug. 238; *Boucher v. Lawson* (1735), Cas. temp. Hardwicke, 85, 89, 195; *Simeon v. Bazett* (1813), 2 M. & S. 94;

Comment.

This Exception applies to any contract to be performed in England, or forming part of a transaction which is to take place in England (*p*). An English Court will not enforce a contract which directly or indirectly violates the law of England.

Exception 3 must, again, in general apply to any contract, wherever made, the performance whereof would directly or indirectly violate the law of a foreign country where the contract is to be performed, or a transaction of which it forms a part is to be carried out; an English Court will not, in general, enforce a contract which violates, or tends to the violation of, the laws of a foreign country within the limits thereof. Hence an agreement made either in England or in Germany for the doing in France of an act (*e.g.*, the founding of a lottery) forbidden by French law would not support an action in England for breach of contract, or, in other words, the contract would be invalid in England (*q*).

Bazett v. Meyer (1814), 5 Taunt. 824; *Sharp v. Taylor* (1848), 2 Phill. 801, 816; *Francis v. Sea Insurance Co.* (1898), 3 Com. Cas. 229; Arnould, *Law of Marine Insurance*, ss. 742—744. Compare Nelson, p. 266; Wharton, ss. 482—484; and Bar (2nd ed.), note by Gillespie, pp. 559, 560. See *Gelot v. Stewart* (1871), 9 M. 1057; *Clements v. Macaulay* (1866), 4 M. 583.

(*p*) See Westlake, s. 214, and compare Exception 1, p. 593, *ante*. As regards England, a contract falling under Exception 3 must usually fall under Exception 1.

(*q*) *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, suggests the conclusion that an English contract to be performed in France, the performance whereof is, at the time when the contract is made, lawful by French law, may be valid in England, even though at the time for the fulfilment of the contract the performance thereof is forbidden by French law. This inference is suggested by the head-note to the report of *Jacobs v. Crédit Lyonnais*, and by some expressions in the case, but is (it is submitted) erroneous. *Jacobs v. Crédit Lyonnais* only decides that a person who enters into an English contract—*i.e.*, a contract governed by the law of England—is not excused for its non-performance in France by circumstances which take place after the contract is made, and afford a legal excuse for non-performance under French, though not under English, law. It does not appear from the case that it would have been illegal under French law to have shipped the cargo, but only that the shipping was prevented by *force majeure*—namely, by the action of the rebels. This hindrance was a valid excuse according to French law, but not according to English law; hence, in an English Court, it could not be a valid defence for non-performance of an English contract. If the shipment had been a violation of French law this would apparently have been a valid excuse in an English Court for the non-shipment of the cargo—*i.e.*, the non-performance of the contract.

When the Government of a foreign country where a contract is to be performed—*e.g.*, a cargo to be loaded by one party, and taken on board ship by the other party—prevents the performance of the contract on both sides, each party is excused from performing his part of the contract. *Cunningham v.*

It must, however, be noted that if a contract is an English contract, it will only be held invalid on account of illegality if it actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country. The validity of an English contract will not be affected solely because the law of such foreign country dispenses one party or both parties to the contract from the necessity of performing it in full (*r*), or makes performance illegal, if that performance need not take place actually in the foreign country (*s*).

Exception 3, however, does not, it would appear, apply to contracts which directly or indirectly violate the revenue laws of countries, such as France or Italy, which do not form part of the British dominions. There is certainly authority for the doctrine that the law of England does not pay any regard to the mere revenue laws of a strictly foreign State (*t*). Although the English decisions which support this doctrine are mostly not of a recent date, its validity has recently been asserted; the doctrine, however, can apparently have no application to the direct violation of the revenue laws of any country, such as Victoria, which forms part of the British dominions.

Illustrations.

1. X contracts with A to smuggle goods into England. X and A are French citizens. The contract is made in France. It is invalid (*u*).

Dunn (1878), 3 C. P. D. (C. A.) 443; *Ford v. Cotesworth* (1870), L. R. 5 Q. B. (Ex. Ch.) 544.

The view of *Jacobs v. Crédit Lyonnais* taken above is approved in *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. (C. A.) 287, 292, 297, 301; 1 K. B. 614, 631—633.

(*v*) *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K. B. 539.

(*s*) Compare *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. (C. A.) 287, with *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888; *Furness, Withy & Co. v. Rederaktiegolabet Banco*, [1917] 2 K. B. 873, 876, per Bailhache, J.; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589.

(*t*) See p. 579, note (*o*), *ante*. Compare *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K. B. 539, 550, per Sankey, J.; *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888; and see Rule 54, p. 230, *ante*. Contrast *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. (C. A.) 287, 300, per Scrutton, L. J.

(*u*) *I.e.*, in England. *Biggs v. Lawrence* (1789), 3 T. R. 454; *Clugan v. Penaluna* (1791), 4 T. R. 466. But contrast *Pellecat v. Angell* (1835), 2 C. M. & R. 311, where the seller did nothing to assist, though aware of, the illegal purpose.

2. *A* and *B* are partners, of whom *A* lives in Guernsey. *A*, on behalf of the firm, sells goods to *X* in Guernsey. The goods are delivered by *A* to *X*, and are packed by *A* in a particular way for smuggling into England. *B*, who lives in England, knows nothing of the sale. The contract is invalid (*v*).

3. In 1796 *X* gives a bond to *A* for the price of goods agreed to be sold and delivered in London by *A* to *X*, and to be by *X* shipped to Ostend and thence reshipped for India, there to be trafficked with, contrary to the statute 7 Geo. I. c. 21, then in force. The bond is invalid (*x*).

4. *X* and *A* make in France a contract relating to litigation in England. The contract is, under English law, bad on the ground of champerty. The contract is invalid (*y*).

5. *X* contracts in England with *A* to smuggle goods into Victoria. The contract is (*semble*) invalid (*z*).

6. *X* contracts in England with *A* to set up a lottery in a foreign country, where the maintenance of a lottery is unlawful. The contract is invalid.

7. *X* contracts with *A* in England to smuggle goods into France. The contract (*semble*) is valid, and an action for the breach thereof can be maintained in England (*a*).

8. *A*, a Spanish shipowner, contracts in London with a British charterer, *X*, to carry goods on board his ship from Calcutta to be delivered to a Spaniard carrying on business in Spain, at Barcelona. *X* agrees to pay freight to *A* at the rate of 50*l.* per ton of the cargo to be carried for *X* on delivery at Barcelona. The contract is an English contract. The goods duly arrived at Barcelona in Spain. Before the arrival of the goods a Spanish law had been passed that such goods, viz., a cargo of jute, should not be delivered, sold, or paid for in Spain at a rate higher than in English money 10*l.* per ton. *X* is willing to pay 10*l.* per ton, but refuses to pay more than 10*l.* on the ground that he cannot do so without breaking the law of Spain. *A* has no right of action (*b*).

(*v*) See p. 599, note (*u*).

(*x*) *Lightfoot v. Tenant* (1796), 1 B. & P. 552.

(*y*) *Grell v. Levy* (1864), 16 C. B. (N. S.) 73.

(*z*) There is no direct authority for this conclusion; *Lightfoot v. Tenant* (1796), 1 B. & P. 552, is a decision based on an Imperial statute, not a local law.

(*a*) See p. 599, note (*t*), *ante*.

(*b*) *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K. B. (C. A.) 287.

9. A United States company issue to *A & Co.*, an English company, 5 per cent. gold bonds, capital and interest payable in London, under a contract to be governed by English law. *X & Co.* guarantee to *A & Co.* the payment of interest. A tax of 2 per cent. is imposed by Congress on income derived by foreign corporations from interest on bonds of companies resident in the United States. This law is no answer in England in an action by *A & Co.* against *X & Co.* on the guarantee, claiming payment in full of the 5 per cent. interest without deduction in respect of the tax (*c*).

10. *X & Co.*, a shipping firm, contract with *A* to carry goods from Trinidad to the United States on terms which involve the payment of a rebate, if the conditions laid down by the shipping firm are complied with. The payment of such rebates is made illegal by an Act of Congress, but the shipping firm continues for some months to maintain its offer of rebates. *A* sues *X & Co.* in the Trinidad Court for payment of the rebates. *X & Co.* plead that payment will expose them to prosecution in the United States, within whose jurisdiction they must necessarily come in course of their shipping business. The United States law is no excuse for non-payment of the rebates (*d*).

11. *X* contracts to purchase from *A* in England 3,600 tons of coal to be shipped at Newcastle, New South Wales, at 17*s.* 9*d.* a ton delivered on board ship, the price to be paid in London. After the contract is made, the price of coal in New South Wales is raised by governmental order 4*s.* a ton. *A* claims payment from *X* at the rate of 21*s.* 9*d.* a ton. *A* cannot (*seem*) recover more than 17*s.* 9*d.*" (*e*).

(*c*) *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K. B. 539. The result is to defeat the purpose of the United States law, but no action illegal in the United States need be performed there. Compare *Spiller v. Turner*, [1897] 1 Ch. 911, where a similar rule was applied in the case of a colonial revenue Act. Contrast *Delage v. Nugget Polish Co.* (1905), 92 L. T. 682, where the revenue Act was English.

(*d*) *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888. The payment of rebates was not actually to be made within the United States.

(*e*) Compare *Mann, George & Co., Ltd. v. Brown, The Times*, July 1, 1921. In that case the Court held that the governmental order did not apply to coals for export, but the decision would presumably have been the same in any event.

(C) THE INTERPRETATION AND OBLIGATION OF CONTRACT.

RULE 161 (*f*).—The interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined in accordance with the proper law of the contract (*g*).

Comment.

The laws of different countries differ as to the incidents which they attach to a given contract. The real effect, therefore, of a contract, *i.e.*, what is the true meaning thereof and what are the rights or obligations of the parties thereto, cannot be determined until we have answered the question, what is the law by reference to which the contract is to be interpreted, explained, or construed?

(*f*) See Intro., General Principle No. 6, pp. 59, 60, *ante*; Foote, pp. 369—376; Story, ss. 263—322; Westlake, ss. 211, 212; Savigny, ss. 369—374 (Guthrie's transl., 2nd ed.), pp. 194—252.

It may be noted that Savigny's views do not at bottom greatly differ from those of Story. Both entirely agree in the principle that the test by which to determine the proper law of a contract is the presumed intention of the parties, and this principle has been now fully adopted by our Courts. *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Chamberlain v. Napier* (1880), 15 Ch. D. 614; *The Gaetano* (1882), 7 P. D. (C. A.) 137; *Chartered Bank of India v. Netherlands Co.* (1882), 9 Q. B. D. 118; (1883), 10 Q. B. D. (C. A.) 521; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321; *The August*, [1891] P. 328, 340. Compare *Chatenay v. Brazilian, &c. Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79. See *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399, especially pp. 405—407, judgment of Esher, M. R.; *Hanlyn v. Talisker Distillery*, [1894] A. C. 202. Both in reality determine the intention of the parties mainly by reference to the law of the country where it is to be performed (*lex loci solutionis*). See especially Story, s. 280. The difference between them is that, where there is no other ground for determining what is the proper law of a contract, Savigny prefers the *lex domicilii* of the debtor, whilst Story, following the English decisions, prefers the *lex loci celebrationis*, or law of the country where the contract is made. See App., Note 5, "Preference of English Courts for *lex loci contractus*." *South African Breweries, Ltd. v. King*, [1899] 2 Ch. 173; [1900] 1 Ch. (C. A.) 273. Cf. *Royal Exchange Assurance Corporation v. Sjöforsakrings Vega*, [1901] 2 K. B. 567; [1902] 2 K. B. (C. A.) 384; *Spurrier v. La Cloche*, [1902] A. C. 446; *British South Africa Co. v. De Beers Consolidated Mines*, [1912] A. C. 52; *Trinidad Shipping Co. v. Alston*, [1920] A. C. 888; *Barry v. Van den Hurk*, [1920] 2 K. B. 709; *Municipal Council of Johannesburg v. D. Stewart & Co.* (1902), *Ltd.*, [1909] S. C. (H. L.) 53; *James Howden & Co. v. Powell Duffryn Steam Coal Co., Ltd.*, [1912] S. C. 920.

(*g*) As to meaning of "proper law of a contract," see Rule 155, p. 572, *ante*.

The one general principle which the law of England supplies for the answer to this inquiry is, "that the rights of the parties to a contract are to be judged of by that law by which they intended [to bind], or rather by which they may justly be presumed to have bound themselves" (*h*). "You must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract" (*i*); in other words, the meaning and effect of every contract depends upon the law by which the parties intended it to be governed, *i.e.*, upon its "proper law."

This general principle applies both to the *interpretation* or explanation of a contract and to the *obligation* of a contract, *i.e.*, the rights and obligations of the parties under it.

Interpretation.—That a contract must be explained in accordance with its proper law, in so far as its meaning depends upon technical legal terms or upon rules of law, is almost self-evident (*k*). The aim of a Court, when called upon to interpret a contract, must be to give to it the sense which was affixed to the contract by the parties when entering into it. But if the law to which the contracting parties looked (*i.e.*, the proper law of the contract) be disregarded, a sense may be given to the terms of their agreement totally different from the sense which they were intended to bear. Thus, if *H* and *W* execute in England a marriage settlement, meant to be carried out in Scotland and to be governed by Scottish law, the very meaning of the terms used, no less than the general effect of the contract, will be misunderstood unless the Court called upon to construe the settlement has regard to the law of Scotland (*l*).

Obligation.—The rights, again, and obligations under a contract of the parties thereto, no less than the meaning of the terms employed therein, must be determined with reference to the law

(*h*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 123, per Willes, J. Compare *Chamberlain v. Napier* (1880), 15 Ch. D. 614, 630, judgment of Hall, V.-C.; *Chartered Bank of India v. Netherlands Co.* (1883), 10 Q. B. D. (C. A.) 521, 540, judgment of Lindley, L. J.; *The Gaetano* (1882), 7 P. D. (C. A.) 137, 146, judgment of Brett, L. J.; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 601, per Curiam; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 340, judgment of Fry, L. J.; *The August*, [1891] P. 328, 340, judgment of Sir J. Hannen.

(*i*) *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 336, per Halsbury, C.

(*k*) See Intro., pp. 60—62, *ante*.

(*l*) See *Chamberlain v. Napier* (1880), 15 Ch. D. 614.

which the parties had in view when they came to an agreement, *i.e.*, the proper law of the contract. For if a contract made with a view to the law of one country be construed in accordance with the law of some other country, it is all but certain that the end of the contract will not be attained, but that one or each of the parties will acquire rights or incur liabilities different from those which the agreement was intended to confer or impose (*m*).

Rule 161, and the grounds on which it rests, are not hard to understand. The true difficulty lies in answering a question to which, when applied to a given case, the Rule immediately gives rise: On what principles are we to determine what was the intention of the parties to a contract in reference to the law by which it should be governed? The answer to this question may often be hard to find, and this for two reasons. Under the complicated transactions of modern life, a contract which contains a foreign element may be so connected with different countries as to suggest not only two, but as many as five or six, different laws as the law by which the parties intended a contract to be governed, or, in other words, as the proper law of the contract. Suppose, for example, that *A*, an Englishman, charters a French ship from *X*, its French owner, at a Danish port in the West Indies, for the carriage of the goods of *A* from Hayti to Genoa, and that the ship, under stress of weather, puts into a Portuguese port, where transactions take place which result in a loss to *A*, and that *A* claims damages from *X*, alleged to be due under the contract between them. In this position of things, which is suggested by a reported case, there are six countries the law of any one of which may, conceivably, at any rate, have been intended by the parties to govern the contract, at least in so far as to determine the question at issue between *A* and *X*. The Court, therefore, when called upon to decide what are *A*'s rights, has before it six different laws from which to select the law on which his rights depend. The intention of the parties, again, as to the law by which a contract is governed, is not generally expressed in the contract itself. What is more, it has often no real existence. If we could look into their *minds*, we should find that they had formed no definite purpose as to the law which should govern their rights under circumstances of which they did not anticipate the occurrence. Here, as in other branches of law, an inquiry into the intention of the parties is really an

(*m*) Rule 161 is nothing else than the most obvious application of General Principle No. VI. (Intro., p. 60, *ante*), which itself is an immediate result of General Principle No. I. (Intro., p. 23, *ante*).

inquiry, not into the actual intention of *X* and *A*, for it possibly never had any real existence, but into the intention which would have been formed by sensible persons in the position of *X* and *A* if their attention had been directed to contingencies which escaped their notice. When this is the case, the law which will be applied by any tribunal to the interpretation of a contract "is that which "will most frequently and most naturally be assumed by ignorant "parties to a contract as that by which their [rights and] liabilities are defined" (*n*). We are then driven back upon the further question, how are we to determine what is this natural assumption? The reply is, that a variety of circumstances must be considered, such as the nature of the contract, the customs of business, the place where the contract is made or is to be performed, and the like, any one of which may suggest conclusions as to the law likely to be intended by the parties; and English judges have constantly declined to tie themselves down by any rigid or narrow rule for determining the intention of the parties, or, in effect, the proper law of the contract.

The conclusions, however, at which the Courts have arrived in particular cases, though based on the circumstances of each case, are not the result of mere guesswork. They lead to, and in turn are the result of, certain maxims by which English Courts are, it is submitted, in the main guided when called upon to determine the proper law of a given contract.

These maxims are formulated in Sub-Rules 1 to 3.

The true nature of these Sub-Rules, if they are to be of any utility whatever, must be carefully borne in mind. They are in no sense rigid canons of construction from which a Court will not deviate. They are rather presumptive rules of evidence which are in fact frequently followed by English judges, but which are not in any degree irrebuttable, and are liable to be displaced by circumstances of any kind which in a given case influence the opinion of the Court (*o*).

Two further observations are worth notice:—

In particular classes of contracts (*p*) custom has established (*q*) certain definite rules as to the presumed intention of the parties.

(*n*) Foote (4th ed.), p. 368.

(*o*) See especially *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 601, judgment of Bowen, L. J.

(*p*) For such contracts, see chap. xxvi., p. 618, *post*. A barrister's right to sue depends on the law affecting his bar. *R. v. Doutre* (1884), 9 App. Cas. 745.

(*q*) See *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115.

Where such established rules exist, recurrence to general presumptions is usually unnecessary, and our Sub-Rules are for the most part superfluous. But this does not invariably hold good, for the presumption established by custom may be rebutted, *e.g.*, by the expressed intention of the parties or by the circumstances of the case (*r*).

In certain rare instances, rules as to the intention of the parties are in effect established by statute (*s*). Such statutory enactment, in so far as it applies, is decisive.

*Sub-Rules for determining the Proper Law of a Contract
in Accordance with the Intention of the Parties.*

SUB-RULE 1 (*t*).—When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption.

Comment.

As the proper law of a contract is fixed by the intention of the parties, their expressed intention with regard to it must (in general) be decisive (*u*).

Illustrations.

1. X, an English underwriter, executes in England a policy of insurance of which it is one of the express terms that it shall be

(*r*) Compare, particularly, *Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 540, judgment of Lindley, L. J.

(*s*) See Bills of Exchange Act, 1882, s. 72, and Rules 171—174, pp. 632—647, *post*.

(*t*) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Ex parte Dever* (1887), 18 Q. B. D. (C. A.) 660. Compare Savigny, ss. 369, 370 (Guthrie's transl., 2nd ed.), pp. 194, 197, and s. 372, p. 221, especially note A, p. 227.

(*u*) Not quite invariably. Parties, whilst really contracting with reference to one law (*e.g.*, the law of England), may conceivably, with a view to give validity to a contract which English law treats as invalid, assert their intention to contract with reference to another law, *e.g.*, the law of Scotland. The Courts must in this case determine the essential validity of the contract with reference to the law under which the parties really intended to contract, *i.e.*, the law of England. See App., Note 22, "What is the Law determining the Essential Validity of a Contract?"

construed and applied in accordance with French law. The law of France is the proper law of the contract (*x*).

2. *X* and *A* enter into a contract in London which is to be performed, except as to the arbitration clause, in Scotland. It is an express term of the contract that any dispute arising out of it "shall be settled by arbitration by two members of the London Corn Exchange in the usual way." As to this arbitration clause the law of England is the proper law of the contract (*y*).

3. *X* and *A* contract at Edinburgh for the performance by *A* of certain agency work for *A* in France. They agree that the High Court shall have jurisdiction in any matters arising out of the contract. The law of England is *primâ facie* the proper law of the contract (*z*).

SUB-RULE 2.—When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract (*a*).

Illustrations.

1. *A*, an Englishman, ships a cargo on board the ship of *X* & *Co.*, a Dutch company registered under Dutch law. The company, however, consists of the same persons as an English company registered under English law. The goods are shipped at Singapore, for this purpose an English port, under a bill of lading in

(*x*) See *Greer v. Poole* (1889), 5 Q. B. D. 272. "It is no doubt competent to an underwriter on an English policy to stipulate, if he think fit, that such policy shall be construed and applied in whole or in part, according to the law of any foreign State, as if it had been made in and by a subject of the foreign State, and the policy in question does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel." *Ibid.*, p. 274, *per Curiam*.

(*y*) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202.

(*z*) See Ord. XI. r. 2a, and compare *Limerick Corporation v. Crompton*, [1910] 2 Ir. R. 416.

(*a*) "In such a case the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties." See *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 601, judgment of Bowen, L. J.

the English form and expressed in English. The cargo is damaged in a collision between the ship on which it is carried and another ship of *X & Co.* The proper law of the contract (bill of lading) is the law of England (*b*), and the presumption which would otherwise exist, that the parties submitted themselves to Dutch law as the law of the flag, is rebutted (*c*).

2. An agreement in writing executed in 1895 at Johannesburg, in the South African Republic, is made between *A & Co.*, a company having its registered office in London, but carrying on business in South Africa, and *X*, a British subject resident in South Africa. *X* thereby agrees to serve the company, as brewer or otherwise, in its business carried on at Johannesburg, or elsewhere in South Africa; by the agreement provision is also made for his residence at Johannesburg, but the agreement is framed in the English language and is in an English form. The rights of the parties under the agreement are governed by the law of the South African Republic (*d*).

3. An Englishman domiciled in England marries, in Scotland, a Scotswoman domiciled in Scotland. Before their marriage they have executed in Scotland a marriage contract (settlement) in the Scottish form. It is part of this contract that, on the death of the husband, his heirs, &c. shall pay to his wife, in case she should survive him, an annuity of 200*l.*, and further pay after his death to the children (if any) of the marriage the sum of 3,000*l.* The husband and wife live after the marriage in England. The law of Scotland is the proper law of the contract, and when, on the death of the husband, his estate is found not to be enough to satisfy both the annuity payable to the wife and the sum of 3,000*l.* payable to the children, the rights of the wife and the children respectively are governed by the law of Scotland (*e*).

4. An Englishman, domiciled in England, marries a Scotswoman domiciled in Scotland. A marriage settlement is, before the marriage, executed in Scotland by the intended husband and wife. In the settlement, trusts are declared in the English form

(*b*) *Chartered Mercantile Bank of India v. Netherlands Co.* (1883), 10 Q. B. D. (Q. A.) 521.

(*c*) *Ibid.*, especially pp. 529, 530, judgment of Brett, L. J., and p. 540, judgment of Lindley, L. J., with which contrast *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The August*, [1891] P. 328; and as to this presumption, and the meaning of the term "law of the flag," see "Contract of Affreightment," Rules 165, 166, pp. 621, 622, *post*.

(*d*) *South African Breweries, Ltd. v. King*, [1900] 1 Ch. (C. A.) 273.

(*e*) *In re Barnard* (1887), 56 L. T. 9; [1887] W. N. 8.

of the husband's real estate in England. The proper law of the contract as regards such trusts is the law of England (*f*).

5. *X & Co.*, a London firm, contract in London to sell to *A & B*, also a London firm, 20,000 tons of esparto, to be shipped by a French company at an Algerian port, on board vessels to be provided by *A & B*, who are to pay for the esparto in London in cash on or before the arrival of the ships at the port of destination. English law is the proper law of the contract (*g*).

6. *X*, residing in England, offers marriage to *A*, residing in Denmark, and is accepted. Later, *X* fails to carry out his undertaking. *A* brings an action in England for breach of promise. English law is the proper law of the contract (*h*).

SUB-RULE 3.—In the absence of countervailing considerations, the following presumptions as to the proper law of a contract have effect:—

First Presumption (i).—*Primâ facie* the proper law of the contract is presumed to be the law of the country where the contract is made (*lex loci contractus*); this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country.

Second Presumption.—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode

(*f*) *Chamberlain v. Napier* (1880), 15 Ch. D. 614. Compare *In re Hewitt's Settlement*, [1915] 1 Ch. 228. See, as to the "proper law of a contract" with regard to immovables, chap. xxvi., Rule 163, p. 618, *post*.

(*g*) *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589.

This case must also be brought under Sub-Rule 3, 1st presumption. See "Contracts with regard to Movables," Rule 164, p. 620, *post*.

(*h*) *Hansen v. Dixon* (1906), 23 T. L. R. 56.

(*i*) Compare *Story*, ss. 242, 280; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, especially p. 600, judgment of Bowen, L. J.; *P. & O. Co. v. Shand* (1865), 3 Moore, P. C. (N. S.) 272; *Scott v. Pilkington* (1862), 2 B. & S. 11; 31 L. J. Q. B. 81.

of performance, may be presumed to be the law of the country where the performance is to take place (*lex loci solutionis*).

Comment.

Both these presumptions are grounded on the probable intention (*k*) of the parties.

As to the first presumption. "The broad rule is, that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties" (*l*).

"One inference which has always been adopted is this: If a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that the parties must have intended that the contract, as to its construction and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made" (*m*).

"It is . . . generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended [to adopt], or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention" (*n*).

These dicta lay down the undoubted rule of English law that the meaning of a contract and the obligations arising under it are *primâ facie* and presumably governed by the law of the country where the contract is made (*lex loci contractus*). The language indeed of judges and writers of authority has sometimes produced the impression that something like exclusive authority is attributed by our Courts to the law of the country where the contract is completed. But this idea is erroneous. In many instances, as is apparent from our second presumption, the meaning and incidents of a contract are governed by the law of the place of performance.

(*k*) See pp. 604—606, *ante*.

(*l*) *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 600, per Bowen, L. J.; *South African Breweries, Ltd. v. King*, [1900] 1 Ch. (C. A.) 273. See Story, s. 242.

(*m*) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79, 82, judgment of Esher, M. R. Compare *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399, 405, judgment of Esher, M. R., cited pp. 481, 482, *ante*.

(*n*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122, *per Curiam*.

The distinct and still strong preference, however, of English Courts for the *lex loci contractus* (o) must never be forgotten. This preference leads to the result that in all cases of doubt, and especially where a contract is made in England, our Courts hold that the proper law of the contract is the law of the country where the contract is made.

As to the second presumption. The assumption, which in many cases is sound, that the proper law of a contract is the law of the country where it is made (*lex loci contractus*), pre-supposes in general that "the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But where the contract is, either expressly or tacitly, to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance" (p).

"The business sense of all business men," says Lord Esher, "has come to this conclusion, that, if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. . . . Therefore, the law has said that if the contract is to be carried out in whole in another country it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country" (q).

"When two parties," says Lord Watson, "living under different systems of law, enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and

(o) See App., Note 5, "Preference of English Courts for *Lex loci contractus*."

(p) Story, s. 280. Compare *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 600, language of Bowen, L. J.

(q) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79, 82, 83, judgment of Lord Esher, M. R.

“legitimate to take into account the circumstances attendant upon the making of the contract, and the course of performing its stipulations contemplated by the parties; and amongst these considerations the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum and the place of performance in another” (r).

The effect of these dicta may be thus summed up. The proper law of a contract is indeed *primâ facie* the law of the country where it is made (*lex loci contractus*); yet when a contract is made in one country, but is wholly or partially to be performed in another, then great weight will be given to the law of the place of performance (*lex loci solutionis*), as being probably the proper law of the contract, in regard, at any rate, to acts to be done there.

Our second presumption covers at least two different cases:—

First case. A contract is made in one country and is to be wholly performed in another, as where X and A enter into an agreement in Scotland, *e.g.*, for the sale of goods by X to A, and the whole of the contract is to be performed on both sides in England. The law of England (*lex loci solutionis*) is, then, presumably the proper law of the contract as a whole, and certainly governs every incident having reference to the mode of performance, *e.g.*, the delivery of and the payment for the goods (s).

Second case. A contract is made in one country, and is to be performed, as regards the obligations of one of the parties, wholly in that country, and as regards the obligations of the other wholly in another country, as where A agrees to deliver goods to X in Liverpool, and X agrees to pay for them in New York. The contract may be treated as two contracts (t), the one to be performed by A in England and the other by X in New York. It is, then, reasonable at any rate to assume (though the presumption is

(r) *Hamlyn v. Talisker Distillery*, [1894] A. O. 202, 212, per Lord Watson. Compare Savigny, s. 372, p. 222.

(s) Whether the law of Scotland may not determine what are the legal excuses for non-performance?

(t) Many difficulties as to the proper law of a contract are removed by noticing that what is called “a contract” is often in effect a set of two or more contracts, and the proper law of these several contracts may be different. This is specially noticeable in regard to the different contracts which may be embodied in a single bill of exchange. See chap. xxvi., Rule 172 (2), p. 639, *post*.

by no means conclusive (*u*) that on the one hand the delivery, etc. of the goods (*i.e.*, the performance of *A*'s share of the contract) is governed by the law of England, and on the other hand the payment for the goods, *i.e.*, the performance of *X*'s part of the contract, is governed by the law of New York (*x*).

Illustrations.

Presumption 1.

1. *X*, a Frenchman domiciled in France, incurs in London a debt to *A* for goods there sold by *A* to *X*. English law (*lex loci contractus*) is the proper law of the contract.

2. A note is made and is payable in England. English law (*lex loci contractus*) is the proper law of the contract (*y*).

3. *X*, an Englishman carrying on business in England, while in New York gives *N*, of New York, a letter of credit to the following effect: "You have authority to draw exchanges upon me, and all such exchanges will be duly honored." This letter is shown to *A*, who, on the faith thereof, purchases a bill drawn by *N* on *X*. *X* does not accept the same. *X* is not liable to *A* by the law of England for not accepting the bill, but he is liable by the law of New York. The law of New York (*lex loci contractus*) is the proper law of the contract (*z*).

4. *A*, an Englishman, contracts in England with *X & Co.*, an English company, for the carriage by them of goods from England to Mauritius on a British ship. *A* takes a ticket at Southampton

(*u*) Compare *Ireland v. Livingston* (1870), 5 Q. B. D. (Ex. Ch.) 516.

(*x*) As to the somewhat different case of "contracts for through carriage," see chap. xxvi., Rule 167, p. 626, *post*.

(*y*) See *Kearney v. King* (1819), 2 B. & Ald. 301; *Sprowle v. Legge* (1822), 1 B. & C. 16. In this as in many other cases the *lex loci contractus* is also the *lex loci solutionis*.

(*z*) "It [is] contended, on the part of the defendants [*X*], that, as the thing contracted for, namely, the acceptance of the bills, was to be performed in this country, the law of England, as that of the place of performance, ought to prevail. We are of a contrary opinion, it appearing to us that the question of the defendant's liability must be determined by the *lex loci contractus*. The question at issue has no relation to the manner of performing the contract, or to the consequences of non-performance. It relates entirely to the effect of the transaction at New York; and the document signed there by one of the defendants on behalf of the rest (his authority to bind the partnership not being called in question) in creating a liability in the defendants to the purchasers of the bills, which by the document the defendants were bound to accept in favour of [*N*]." *Scott v. Pilkington* (1862), 31 L. J. Q. B. 81, 90, per Cockburn, C. J. See 2 B. & S. 11, 43, 44.

which contains a condition limiting the liability of the company. *A*'s goods are lost in Egypt. The condition, according to English law, covers the liability of *X & Co.* According to the law of Mauritius (French law), it does not cover their liability. English law (*lex loci contractus*) is the proper law of the contract (*a*).

5. *X*, an Englishman, makes a contract in London with *A*, a Scotsman, under which *A* is to act as traveller for *X* in Scotland. *Semble*, English law is the proper law of the contract (?) (*b*).

Presumption 2.

6. *X* contracts a debt to *A* in Jamaica which is made payable in London. English law (*lex loci solutionis*) is, at any rate as regards payment, the proper law of the contract (*c*).

7. In 1870 a bill of exchange is drawn by *X* in England on *N & Co.*, French subjects resident in Paris, and is indorsed in England by *X* to *A*. The bill is accepted by *N & Co.* in Paris, and is on the face of it payable on 5th October, 1870. In consequence of the Franco-German war, the time for payment is under French law enlarged till 5th September, 1871. French law is the proper law of the contract, and the bill, as against all the parties thereto, is payable on 5th September, 1871 (*d*).

8. *X* in England charters *A*'s ship for carriage of coals to Algiers. It is part of the terms of the charter-party that the ship shall be unloaded at a certain rate *per diem*, and that *X* shall pay 5*l.* *per diem* for detention from the time of the ship being ready to unload and "in turn to deliver." Delivery is delayed by the French port regulations. In reference to delivery the proper law of the contract is the French law as to unloading at the port (*lex loci solutionis*) (*e*).

9. *X*, an Englishman, under a charter-party made between him and *A*, a foreigner, at Riga, loads *A*'s ship with a cargo of timber to be delivered in the port of Liverpool. A given number of lay days are allowed for the unloading. By the general law, the lay

(*a*) *P. & O. Co. v. Shand* (1865), 3 Moore, P. C. (N. S.) 272. Compare *Nugent v. Smith* (1875), 1 O. P. D. 19; and (1876) (C. A.) 423. See as to "Contract for Through Carriage of Person or Goods," Rule 167, p. 626, *post*.

(*b*) *Arnott v. Redfern* (1825), 2 C. & P. 88.

(*c*) Compare *Cash v. Kennion* (1805), 11 Ves. 314, with *Manners v. Pearson*, [1898] 1 Ch. (C. A.) 581. See also Rule 181, p. 659, *post*.

(*d*) *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; *In re Francke and Rasch*, [1918] 1 Ch. 470. See as to Bills of Exchange, Rules 171—173, pp. 632—644, *post*.

(*e*) *Robertson v. Jackson* (1845), 2 C. B. 412; 15 L. J. C. P. 28.

days commence from the time when the ship arrives in dock; but by the custom of the port of Liverpool the lay days, in case of the timber ship, begin only from the mooring of the ship at the quay, where alone by dock regulations the ship can discharge cargo. The commencement of the lay days is governed by the custom of the port of Liverpool (*lex loci solutionis*) (*f*) as the proper law of the contract.

(D) DISCHARGE OF A CONTRACT.

RULE 162(*g*).—The validity of the discharge of a contract (otherwise than by bankruptcy (*h*)) depends upon the proper law (*i*) of the contract (*k*)(?).

(1) A discharge in accordance with the proper law of the contract is valid (*l*).

(2) A discharge not in accordance with the proper law of the contract is not valid (?).

Comment.

On principle, the validity or invalidity of the discharge of a contract ought to depend upon the proper law of the contract, *i.e.*, upon the law to which the parties, when contracting, intended to submit themselves. If, for example, X and A, French citizens, enter into a contract in France to be performed in France, and which therefore is clearly subject to French law, the question whether an act on the part of X, *e.g.*, some act which X alleges

(*f*) *Norden Steam Co. v. Dempsey* (1876), 1 C. P. D. 654. Conf. *Atwood v. Sellar* (1880), 5 Q. B. D. (C. A.) 286.

(*g*) Story, ss. 330—334, 342, with which read s. 280; Nelson, pp. 278, 279; Foote, pp. 430—436.

In order to understand Story's view, it must be noted that his habit is to speak of a contract as governed by the law of the place where it is made, but that he often means by this the law of the place where it is made and is to be, or may be, performed.

(*h*) As to Discharge under a Bankruptcy, see chap. xviii., Rules 126, 127, pp. 477—480, *ante*.

(*i*) For meaning of "proper law," see p. 572, *ante*.

(*k*) *Warrender v. Warrender* (1834), 9 Bli. 89, 125, language of Brougham, C.; *Ralli v. Dennistoun* (1851), 6 Ex. 483; 20 L. J. Ex. 278; *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234.

(*l*) Subject, however, to the limitation that English Courts will not enforce the law of an "enemy" State affecting contracts if it is of a confiscatory character. *In re Fried Krupp Actiengesellschaft*, [1917] 2 Ch. 188.

amounts to payment, does or does not discharge *X* from liability, must (it is conceived) be determined by reference to French law, and this appears to be the view maintained by English Courts and by writers such as Story. There is, however, a lack of decisive authority on the subject.

All that can be absolutely laid down is, that, when a contract is made and to be performed in the same country, anything which discharges the liability under the law of that country will be held a good discharge by our Courts. "The general rule is, that a "defence or discharge, good by the law of the place where the "contract is made or is to be performed, is to be held of equal "validity in every other place where the question may come to "be litigated" (*m*). So in a particular case it is laid down that, "inasmuch as it appeared that the accord and satisfaction was "sufficient according to the law of the country where the bill was "negotiated and the payment was made, the bill being then due "and payable and in the hands of the true holder, the defence [of "accord and satisfaction according to that law] was good" (*n*); and more generally it has been said: "There is no doubt that a "debt or liability arising in any country, may be discharged by "the laws of that country, and that such a discharge, if it extin- "guishes the debt or liability and does not merely interfere with "the remedies or course of procedure (*o*) to enforce it, will be an "effectual answer to the claim, not only in the Courts of that "country, but in every other country. This is the law of Eng- "land, and is a principle of private international law adopted in "other countries" (*p*).

On the whole, therefore, we may fairly conclude "that a con- "tractual obligation, which has been extinguished by the law of "that country which properly and substantially governs the obli- "gation of the contract, cannot be enforced here" (*q*), and that a contractual obligation which has not been so extinguished can be enforced in England.

(*m*) Story, s. 331.

(*n*) *Ralli v. Dennistoun* (1851), 6 Ex. 483, 493, per Parke, B. Compare *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; *In re Francke and Rasch*, [1918] 1 Ch. 470.

(*o*) Anything of this nature depends wholly on the *lex fori*. See chap. xxxii., Rule 203, *post*.

(*p*) *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228, 234, per Curiam. Compare *Gibbs v. Société Industrielle, &c.* (1890), 25 Q. B. D. (C. A.) 399, 405, language of Lord Esher, cited pp. 481, 482, *ante*.

(*q*) Nelson, p. 279.

Illustrations.

1. X, a Frenchman, incurs in France a debt to A, also a Frenchman. X is under French law absolutely discharged from all liability to A, *e.g.*, by a statute which after the lapse of a given time extinguishes not only the remedy for the recovery of the debt, but the debt itself. *Semble*, the discharge is valid in England (*r*).

2. X in Austria becomes liable to A on a bill of exchange drawn by A and accepted by X in Austria, and there payable. X, on the bill becoming due, owes A a sum equivalent to 100*l*. He satisfies A's claim by the payment of 90*l*., which A accepts in satisfaction of the debt. This would not be an accord and satisfaction under English, but is an accord and satisfaction under Austrian law. The accord and satisfaction is a valid discharge of X's debt to A (*s*).

3. A bill for 100*l*. is drawn and issued in Demerara, but is accepted and payable in England. At the time when the bill matures, the holder owes the acceptor 100*l*. According to the law of Demerara, this operates as a discharge of the bill (by *compensatio*). The drawer is discharged in England (*t*).

4. Business is carried on in Queensland by an English company. Resolutions are passed by the company under which certain preference shareholders become entitled to a cumulative payment of interest at the rate of 6 per cent. per annum in priority to other shareholders. By a subsequent Act of the colonial legislature, a duty in the nature of income tax is imposed on all dividends or interest paid out of assets in the colony to members of any company carrying on business therein, and a duty payable in respect of the amount received by any member is declared a debt due by him to the Crown. The contract between the preference and the ordinary shareholders is an English contract, and the preference shareholders not domiciled in Queensland are entitled to 6 per cent. without any deduction in respect of the colonial duty, *i.e.*, the colonial Act is not a discharge of the debt due under the English contract (*u*).

(*r*) Compare *Huber v. Steiner* (1835), 2 Bing. N. C. 202.

(*s*) See *Ralli v. Dennistoun* (1851), 6 Ex. 483, 493. Compare *Burrows v. Jemino* (1726), 2 Strange, 733.

(*t*) *Allen v. Kemble* (1848), 6 Moore, P. C. 314.

(*u*) *Spiller v. Turner*, [1897] 1 Ch. 911. Doubtless in England it is not a discharge as regards preference shareholders domiciled in Queensland. Compare *Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K. B. 539.

CHAPTER XXVI.

PARTICULAR CONTRACTS.

(A) *CONTRACTS WITH REGARD TO IMMOVABLES* (a).

RULE 163 (b).—The effect of a contract with regard to an immovable is governed by the proper law (c) of the contract (?) (d).

The proper law of such contract is, in general, though not necessarily, the law of the country where the immovable is situate (*lex situs*) (e).

Comment.

This Rule is open to some doubt (f). It constitutes (if valid) an exception to the general doctrine, that all rights connected with land are to be determined by the *lex situs* (g).

The limitations, therefore, to our Rule must be noted:—

First. Rule 163 does not apply to a conveyance. A contract with regard to land may be governed by its proper law, but a

(a) See Westlake (5th ed.), s. 216; Nelson, p. 277. Contrast Story, ss. 363—365.

(b) *Campbell v. Dent* (1838), 2 Moore, P. C. 292; *Cood v. Cood* (1863), 33 L. J. Ch. 273; *Waterhouse v. Stansfield* (1851), 9 Hare, 234; (1852), 10 Hare, 254. Compare *Mercantile Investment Co. v. River Plate, & Co.*, [1892], 2 Ch. 303.

(c) As to meaning of “proper law,” see p. 572, *ante*.

(d) See Exception 1 to Rule 150, p. 553, *ante*.

(e) Compare *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122.

See App., Note 20, “Law governing Contracts with regard to Immovables.”

As to “Capacity,” see chap. xxiii., p. 543, *ante*; as to “Form,” see chap. xxiii., pp. 544—546, *ante*.

(f) See, in support of this Rule, Westlake (5th ed.), s. 216, and Nelson, p. 277. Contrast, however, Story, ss. 363—365, who inclines to hold that executory contracts respecting real estate or immovables are governed wholly by the *lex situs*. Story’s view ignores the fact that English law recognizes and, so far as possible, enforces contracts in the nature of equitable mortgages over foreign lands, even when the local law does not admit of such contracts.

(g) See Rule 150, p. 542, *ante*.

conveyance or transfer of land, or of any interest in land, is certainly governed by the *lex situs* (*h*).

Secondly. English Courts will not enforce the doing of anything with regard to foreign land which the *lex situs* will not permit to be done (*i*).

Thirdly. Parties who enter into a contract with regard to land may in general be presumed to contract with a view to the law of the country, *e.g.*, France, where the land is situate. Hence the *lex situs* is in general the proper law of the contract (*k*).

Illustrations.

1. X, an Englishman, residing but not domiciled in Chili, and A and B, his brothers, Englishmen, residing and domiciled in England, have each of them an interest in certain land in Chili. X enters into negotiations with A and B, which are carried on by correspondence, for the purchase by X of A's and B's shares in the land. It is alleged on the part of X that the negotiations resulted in a contract whereby both A and B agreed to sell their share in the land to X. It is held by a Court in Chili that A did, and B did not, contract to sell his interest in the land. The contract is an English contract (*l*), and the question whether B contracted to sell his share in the land is to be determined in accordance with English law (*l*) (proper law of contract).

2. X and A make an agreement in Scotland for the discharge of a mortgage of lands in Demerara by bills payable in Scotland. This is a Scottish contract, since, though referring to lands in Demerara, it is made and to be performed in Scotland. It is

(*h*) See Story, s. 424, cited p. 542, *ante*; and Westlake (5th ed.), s. 156, cited p. 542, *ante*; *Hicks v. Powell* (1869), L. R. 4 Ch. 741; *Norton v. Florence Land Co.* (1877), 7 Ch. D. 332, 336. But as to marriage as an assignment of immovables, see pp. 546, 553—556, *ante*.

(*i*) *Campbell v. Dent* (1838), 2 Moore, P. C. 292; *Waterhouse v. Stansfield* (1851), 9 Hare, 234; (1852), 10 Hare, 254; *Brown v. Gregson*, [1920] A. C. 860; Westlake, s. 216. Compare Rule 160, Exception 3, p. 597, *ante*.

(*k*) See *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 122, 123.

(*l*) For meaning of "English contract," see p. 590, note (*e*), *ante*. "But then arises this question: The law of which country is it governs the transaction and the actors in it? The right to land in Chili must, no doubt, be determined by their laws; but a contract entered into between three English gentlemen, two of them domiciled and residing in England, and the third residing in Chili, but not having acquired a foreign domicile, must, I think, be governed and construed by the rules of English law." *Cood v. Cood* (1863), 33 L. J. Ch. 273, 278, judgment of Romilly, M. R.

governed by, and to be interpreted in accordance with, Scottish law (*m*) (proper law of contract).

(B) *CONTRACTS WITH REGARD TO MOVABLES.*

RULE 164 (*n*).—The effect of a contract with regard to a movable is governed by the proper law of the contract.

Comment.

Here, again, it is necessary to distinguish between a contract and a transfer or an assignment. A contract, *e.g.*, to sell a movable, is governed by the proper law of the contract, *i.e.*, by the law to which the parties must be taken to have intended, when contracting, to submit themselves. Whether the transfer or the assignment of a movable is valid, and therefore whether a contract to sell operates as a sale, depends, generally at any rate, on the law of the country where the movable is situate (*o*) (*lex situs*).

Illustration.

X & Co., a London firm, contract in London to sell to *A*, a merchant in London, 20,000 tons of Algerian esparto, to be shipped by a French company at an Algerian port on board ships to be provided by *A*. The esparto is to be paid for by *A* in London. *X & Co.* fail to deliver the esparto. The failure arises from the fact that at the time for the performance of the contract there is an insurrection, and military operations are being carried on, in Algeria, and the collection and transport of esparto are prevented by circumstances which, according to French law, amount to *force majeure*, and are an excuse for the non-performance of the contract, but which under English law are not a legal excuse for the non-performance of their contract by *X & Co.*

(*m*) *Campbell v. Dent* (1838), 2 Moore, P. C. 292.

(*n*) *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589. See, as to assignment of movables, chap. xxiv., pp. 560—571, *ante*; as to capacity to contract, Rule 158, p. 577, *ante*.

(*o*) See Rules 152—154, pp. 561—570, *ante*; *Cammell v. Sewall* (1860), 5 H. & N. 728; 29 L. J. Ex. 350 (Ex. Ch.); (1858), 3 H. & N. 617; 27 L. J. Ex. 447; *Castrique v. Imrie* (1870), L. R. 4 H. L. 414; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238; *Hooper v. Gumm* (1867), L. R. 2 Ch. 282; *In re Queensland, &c. Co.*, [1891] 1 Ch. 536, 545. Compare, however, *Cochrane v. Moore* (1890), 25 Q. B. D. (C. A.) 57.

English law is the proper law of the contract (*p*), and *X & Co.* are liable to pay damages for the non-performance thereof (*q*).

(C) *CONTRACT OF AFFREIGHTMENT* (*r*).

RULE 165 (*s*).—The term “law of the flag” means the law of the country (*t*) whereof a ship carries the flag.

When the flag carried by a ship is that of a State (*u*) including more than one country, the law of the flag means (*semble*) the law of the country where the ship is registered (*x*).

Comment.

“The law of the flag” is a short expression for the law of the country under the flag of which a ship sails, and to which, therefore, she presumably belongs (*y*).

The flag which a ship carries may be the flag of a State, such as the United States, which consists of several countries (*e.g.*, New York, Massachusetts, Louisiana, &c.) governed by different laws. When this is so, the flag does not of itself show what is the country to which the ship presumably belongs, and what, therefore, is the law of the flag. There is, at any rate, American authority for the

(*p*) See Sub-Rule 3, p. 609, *ante*.

(*q*) *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589. For an explanation of this case, see note (*q*), p. 598, *ante*.

(*r*) See, for nature of contract, 3 Kent, Comm. (12th ed.), ss. 201—251, and compare Westlake (5th ed.), ss. 219—222. See also, as to conflict of laws on the subject of carriage by sea, Carver, Carriage by Sea, chap. vii., ss. 201—217.

(*s*) See MacLachlan (5th ed.), pp. 177—186; Carver, ss. 203—206; Scrutton, Charter-parties (9th ed.), art. 7. Contrast, however, Westlake (5th ed.), s. 219.

(*t*) For the meaning of the term “country,” see pp. 67, 69—71, *ante*.

(*u*) For the meaning of the term “State,” see pp. 67, 71, *ante*.

(*x*) Wharton, s. 441 and s. 357.

(*y*) The country to which a ship in fact belongs is sometimes treated as ultimately fixed by the nationality of her owner, and circumstances may exist under which a ship, for some purposes at any rate, belongs to a country of which she does not carry the flag. See *Chartered Bank of India v. Netherlands Co.* (1883), 10 Q. B. D. (C. A.) 521, 534, 537, judgment of Brett, L. J. The term “law of the flag,” therefore, is, by some writers, given a wider sense than that which it receives in Rule 165, and is used as equivalent to the personal law of the shipowner. See Westlake, s. 219. Such cases, however, are more properly regarded as falling under the proviso in Rule 166.

statement that in this case the law of the flag is the law of the country where the ship is registered (*z*).

Illustrations.

1. A ship carrying the Italian flag is about to sail from Havre for Bombay. The law of the flag is the law of Italy.

2. An American ship, carrying the flag of the United States and registered at New Orleans, is at Liverpool, about to sail for Hamburg. The law of the flag is the law of Louisiana (*a*).

RULE 166 (*b*)—Subject to the exception hereinafter mentioned, the effect and incidents of a contract of affreightment (*i.e.*, a contract with a shipowner to hire his ship, or part of it, for the carriage of goods) are governed by the law of the flag.

Provided that the contract will not be governed by the law of the flag if, from the terms or objects of the contract, or from the circumstances under which it was made, the inference can be drawn that the parties did not intend the law of the flag to apply (*c*).

Comment.

This Rule is an application of Rule 161. The parties to a contract of affreightment, or, using more popular though not quite accurate language, for the carriage of goods by sea on board a particular ship, are presumed, in the absence of evidence to the contrary, to contract with reference to the law of the country to which the ship, from the flag at her masthead, may be seen, or at any rate may be presumed, to belong (*d*).

Nor does it necessarily make any difference that, though the ship is a foreign ship carrying a foreign flag, the contract is made

(*z*) Wharton, *Conflict of Laws*, s. 441 and s. 357. There is not, however, any authority for the application of this Rule to the British dominions; the law of the flag in their case is English law. But see p. 72, note (*g*).

(*a*) Wharton, s. 441.

(*b*) Compare Westlake, ss. 218, 219; Carver, *Carriage by Sea*, s. 206; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *The Gaetano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. 328, 340; *The Stettin* (1889), 14 P. D. 142; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321, 327.

(*c*) See Carver, s. 210; *Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521; *The Industrie*, [1894] P. (C. A.) 58.

(*d*) See *The Gaetano* (1882), 7 P. D. (C. A.) 137, 149, 150, per Cotton, L. J.

in England. It may still in general be presumed that the parties looked to foreign law as determining the effect of their contract (*e*).

"*Lloyd v. Guibert* (*f*) establishes," writes Mr. Carver, "that, where the shipowner's total liability is limited by the law of his own country, in which he is domiciled and under whose flag he sails his ship, that limitation is to be implied in contracts to carry goods in her. Whether the contract be made by the master, under a limited authority, or by the owner himself, the law of the flag determines his liability in point of total amount" (*g*). But the reasoning in *Lloyd v. Guibert*, and in subsequent cases (*h*), really goes further, and establishes the wider proposition that, to adopt again the language of Mr. Carver, "the character of the obligations *impliedly* undertaken by the shipowner (with reference to which the contract is made, so far as it does not expressly vary or exclude them) are also to be determined by the law of the flag. Hence it follows that the effect of the *expressed* terms in limiting or altering those obligations must be determined by the same law. Also, that the same law must govern the rights of the shipowner against the charterer or shipper, and the obligations of the latter under the contract. For the contract is a whole, and must be read in the light of one and the same consistent set of rules. The exceptions must be read with the obligations, and the obligations on one side with those on the other, for which they are the considerations, and of which they are frequently conditions" (*i*).

The proviso, however, contained in our Rule is itself a result of Rule 161 (*k*). If from any circumstance it can be inferred that the parties to a contract for carriage by sea did not contract with a view to the law of the flag, then the law of the flag is not the proper law of the contract, and the contract is not governed thereby (*l*).

Illustrations.

1. *A* charters a French ship belonging to *X* and *Y*, French owners, at a Danish West India port, for a voyage from Hayti to

(*e*) *Ibid.*, p. 148, judgment of Brett, L. J.

(*f*) (1865), L. R. 1 Q. B. 115.

(*g*) Carver, s. 206.

(*h*) See *The Gaetano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. 328.

(*i*) Carver, s. 206.

(*k*) See p. 602, *ante*.

(*l*) *Chartered Bank of India v. Netherlands Steam Co.* (1883), 10 Q. B. D. (C. A.) 521; *The Industrie*, [1894] P. (C. A.) 58.

Havre, London, or Liverpool, at *A*'s option. The charter-party is entered into by *N*, the master, in pursuance of his general authority as master. *A* ships a cargo at Hayti for Liverpool, with which the ship sails. On her voyage she sustains damage and puts into Fayal, a Portuguese port, for repair. *N* there borrows money from *B* on bottomry of the ship, freight, and cargo, and repairs the ship. She completes her voyage to Liverpool. *B*, the bondholder, proceeds in the English Court of Admiralty against the ship, freight, and cargo, which are insufficient to satisfy the bond. The deficiency is paid by *A*. *X* and *Y* give up the ship and cargo to *A*, and are thereby, according to French law, freed from all liability on the contract of *N*, *i.e.*, on the bottomry bond. *A* claims indemnity against *X* and *Y* for money paid to *B*. The rights of *A* and the liabilities of *X* and *Y* are governed by the law of France, *i.e.*, law of the flag (*m*).

2. *X*, an Englishman, ships a cargo at New York on board an Italian ship for carriage to London. The ship is at the island of Fayal (Portuguese territory) in distress. *N*, the master, there borrows 2,000*l.* on bottomry of the ship, cargo, and freight, to enable her to proceed on her voyage to London. *N* has the means of communicating with *X*, but does not do so. The bond, under the circumstances, is valid according to Italian law (law of the flag), but would not be valid according to English law. The bond is valid and binds the cargo (*i.e.*, the authority of the master and the validity of the bond is to be determined, as against *X*, by the law of the flag) (*n*).

3. A German ship, while in a German port, is chartered by English charterers under a charter-party in the English language. The ports of call for orders and delivery of cargo are English. A question arises with reference to delay in delivery of cargo. The contract (*semble*) is governed by English law (*o*).

4. *A* is a German shipowner domiciled in Germany. *A*'s ship carrying the German flag and with a German master, is in a French port. *X & Co.* are London merchants. A contract (charter-party) is entered into in London between *A* and *X* for

(*m*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. (Ex. Ch.) 115.

(*n*) *The Gaetano* (1882), 7 P. D. (C. A.) 137; and contrast *The Hamburg* (1864), Br. & L. 253; 33 L. J. P. & M. 116; but note the suggestion of Brett, L. J., 7 P. D. p. 147, that *The Hamburg* may have been rightly decided, because foreign law was not proved in that case.

(*o*) *The San Roman* (1872), L. R. 3 A. & E. 583. Contrast *The Express* (1872), L. R. 3 A. & E. 597, where the charterers were German, and the voyage was from Russia to England, and German law was held applicable.

carriage, on board *A*'s ship, of a cargo of rice from India to England. The contract is on an ordinary English printed form, and the terms are the terms of an ordinary English charter-party. It contains special provisions as to the payment of freight on right delivery. On the voyage home, the ship is driven into a port of distress, where part of the cargo is sold. If the contract is governed by the law of the flag (German law), then *A* is entitled to the payment of full freight; if the contract is governed by English law, then *A* is not entitled to the payment of freight for the cargo sold. The circumstances of the case, and especially the provisions as to payment of freight, show an intention to contract under English law. The law of the flag is excluded, the contract is governed by English law, and *A* is not entitled to full freight (*p*).

Exception (q).—The mode of performing particular acts under a contract of affreightment (*e.g.*, the loading or unloading or delivery of goods) may be governed by the law of the country where such acts take place.

SUB-RULE (*r*).—The authority of the master of a ship to deal with the cargo during the voyage, and the manner in which he should execute it, are governed by the law of the flag.

Comment.

The Sub-Rule is an application of Rule 166 (*s*). But in this instance, as often happens, a special application of a general legal principle is supported by a greater amount of authority than the

(*p*) *The Industrie*, [1894] P. (C. A.) 58.

(*q*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. (Ex. Ch.) 115, 125, 126. Compare *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, 604, judgment of Bowen, L. J.; *Norden Steam Co. v. Dempsey* (1876), 1 C. P. D. 654. See Carver, Carriage by Sea, s. 207, and Rule 161, Sub-Rule 3, Second Presumption, p. 609, *ante*.

(*r*) Carver, s. 211; Scrutton, pp. 20, 21; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. (Ex. Ch.) 115; *The Gastano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. (C. A.) 328. Compare *The Karnak* (1869), L. R. 2 P. C. 505, and especially pp. 511—513, for language of judgment delivered by Sir W. Erle; *Norden Steamship Co. v. Dempsey* (1876), 1 C. P. D. 654.

(*s*) See p. 622, *ante*.

principle itself; in other words, the cases which establish the rule that a contract of affreightment is generally governed by the law of the flag are, many of them, decisions having reference to the master's authority (*t*) during the voyage to deal with the cargo. The extent of his authority and the conditions under which it may be exercised differ somewhat under the laws of different countries, but when a conflict arises on this point the law of the flag prevails (*u*).

Illustrations.

1. A German ship, sailing under the German flag, is loading at Singapore for London. She there takes on board a cargo shipped by British subjects under English bills of lading in the usual form. In the course of the voyage the ship is driven into a port of distress, and the master there sells part of the cargo. The master's authority to make the sale is governed, not by the law of England, but by the law of Germany (law of the flag) (*x*).

2. An Italian ship, sailing under the Italian flag, and with an Italian master, is at Fayal, a Portuguese port, laden with a cargo owned by *X & Co.*, who are domiciled in England, and is bound on a voyage to London. The master borrows money on bottomry of the ship and cargo. The authority of the master to execute a bottomry bond is governed by the law of Italy (law of the flag) (*y*).

(D) CONTRACT FOR THROUGH CARRIAGE OF PERSON OR GOODS (*z*).

RULE 167 (*a*).—The effect of a contract for the carriage of person or goods from a place in one country to a place in another is, as to its general incidents, presumably governed by the law of the place where it is made; but,

(*t*) *The Gaetano* (1882), 7 P. D. (C. A.) 137; *The August*, [1891] P. (C. A.) 328.

(*u*) See Carver, s. 211.

(*x*) *The August*, [1891] P. (C. A.) 328. Compare *Freeman v. East India Co.* (1822), 5 B. & Ald. 617.

(*y*) *The Gaetano* (1882), 7 P. D. (C. A.) 137.

(*z*) See Carver, s. 212.

(*a*) *Branley v. S. E. Ry. Co.* (1862), 12 C. B. (N. S.) 63; *Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. (N. S.) 272; *Cohen v. S. E. Ry. Co.* (1877), 2 Ex. D. (C. A.) 253. But contrast *De Cleremont v. Brasch* (1885), 1 T. L. R. 370.

as to transactions taking place in a particular country, may in certain cases be governed by the law of such country.

Comment.

• There is great uncertainty as to what is the law governing a contract for through carriage of person or goods, which may often be partly by land and partly by water, from a place (*e.g.*, London) in one country to a place (*e.g.*, Paris) in another (*b*). Here, as elsewhere, the only ultimate test for determining the law by which a contract is governed is the presumed intention of the parties (*c*); but, in the kind of contracts with which we are dealing, it constantly happens that no one salient consideration presents itself from which the intention of the parties may be inferred. All that can be strictly laid down is that English Courts, while giving weight to the particular circumstances of each case, still lean, on the whole, to the doctrine that a contract for through carriage is *primâ facie* governed by the law of the country where it is made (*lex loci contractus*) (*d*), and exhibit also a tendency to hold that a contract which can in any way be connected with England is, *primâ facie* at any rate, an English contract governed by English law. When, further, as frequently happens in contracts for through carriage, a provision of the contract is valid if governed by the law of one country, but invalid if governed by the law of another country, our Courts are inclined to hold that the contract is governed by the law which gives validity to all its terms (*e*).

A suggestion well worth consideration has been made that a "contract for through carriage" may be governed, as to incidents arising in a given country, by the law of the particular country where they take place; thus, if *A* takes in Paris a ticket for the journey from Paris to London, and he is himself injured or his

(*b*) See Carver, s. 212.

(*c*) See Rule 155, p. 572, *ante*, and Rule 161, p. 602, *ante*.

(*d*) *Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. (N. S.) 272; and see Rules for determining the proper law of a contract, Sub-Rule 3, First Presumption, p. 609, *ante*.

(*e*) See, especially, *Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. (N. S.) 272, 291, 292, judgment of P. C., and compare *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321. Whether this mode of reasoning is legitimate may, it is conceived, be open to doubt; compare *Royal Exchange Assurance Corporation v. Sjöforsakrings Aktiebolaget Vega*, [1902] 2 K. B. (C. A.) 384, which is opposed to this doctrine.

goods are lost in France, his rights may, in respect of the injury or loss, possibly, whatever be the law otherwise governing the contract, depend on the law of France (f).

Illustrations.

1. A is a passenger travelling, by an English vessel belonging to an English company, from England to the Mauritius *via* Alexandria and Suez. He has taken a ticket in England containing conditions exempting X & Co. from liability for loss of luggage. A's luggage is lost on the journey. The condition is valid by English law, but is not valid by the law of Mauritius. The contract is governed by English law (*lex loci contractus*) and the condition is valid (g).

2. X & Co. are a railway company incorporated under English Acts of Parliament for conveyance of passengers and goods from London to Folkestone, and authorized by statute to maintain packets between Folkestone and Boulogne. A at Boulogne delivers parcels to X & Co. to be carried to London. The contract of carriage contains conditions which may be invalid according to the law of England, but are valid according to the law of France. The contract (*semble*) is governed by the law of France (h) (*lex loci contractus*).

3. X & Co., an English railway company, subject to English statutes as to carriage by rail and authorized to keep steamers for communication between Boulogne and Folkestone, contract with A, an Englishman, for the carriage of himself and his luggage from Boulogne to London. A takes his ticket at Boulogne. On the ticket there is a condition exempting X & Co. from liability for loss of luggage of greater value than 6*l*. A's box, containing articles of greater value than 6*l*., is lost during transfer from steamboat to train at Folkestone. By French law a carrier cannot protect himself, by conditions, against results of negligence. Whether the contract is governed by English or by French law (?) (i).

(f) See *Cohen v. S. E. Ry. Co.* (1877), 2 Ex. D. (C. A.) 253, 262, judgment of Brett, L. J.

(g) *The Peninsular and Oriental Co. v. Shand* (1865), 3 Moore, P. C. (N. S.) 272. Conf. *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321.

(h) See *Branley v. S. E. Ry. Co.* (1862), 12 C. B. (N. S.) 63, 72, judgment of Erle, O. J. The case is not decisive, since it was doubtful whether the contract was invalid under English law.

(i) *Cohen v. S. E. Ry. Co.* (1877), 2 Ex. D. (C. A.) 253. It was not necessary to decide this point, as the Court held that the condition was not valid.

4. *A* contracts at a railway station in Paris for the carriage of himself and luggage from Paris to London. He is to be carried from Paris to Calais by a French railway company, from Calais to Dover by an English steamboat belonging to the S. E. Ry. Co., and from Dover to London by the S. E. Ry. Co. His goods are lost and he is injured at Amiens in consequence of an accident arising from the negligence of the railway company's servants. Whether the contract is, as to the damage done to *A* and his goods, governed by French law or by English law (?) (*k*).

(E) AVERAGE ADJUSTMENT.

RULE 168 (*l*).—As amongst the several owners of property saved by a sacrifice, the liability to general average (*m*) is governed by the law of the place (called hereinafter the place of adjustment) at which the common voyage terminates (that is to say),—

- (1) when the voyage is completed in due course, by the law of the port of destination ; or,

either under English or French law. Mellish, L. J., says: "I confess, for my own part, that, the contract being made by an English passenger with an English railway company, regulated by English law, I should have supposed that it ought to be governed by the law of England, and be taken as made with regard to the law of England" (pp. 257, 258). Baggallay, L. J., says: "As to whether [the contract] should be construed according to the law of France or England, I desire not to express any decided opinion, though it appears to me, as at present advised, that there is much to be said in favour of it being construed according to the law of France" (pp. 261, 262). Brett, L. J., holds that "this particular contract is an English contract, to be performed according to the English law" (p. 263), but throws out the suggestion that contracts of the kind may, perhaps, be governed by different laws as to incidents taking place in different countries (p. 262).

(*k*) See *Cohen v. S. E. Ry. Co.* (1877); 2 Ex. D. (C. A.) 253, 262, 263, judgment of Brett, L. J.

(*l*) See Lowndes, *Law of General Average* (5th ed.), chap. vi.; Arnould, *Law of Marine Insurance* (9th ed.), Part III., chap. iv., especially ss. 992—1002.

(*m*) "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within 'general average, and must be borne proportionately by all who are interested.'" *Birkley v. Presgrave*, 1 East, 220, 228, per Lawrence, J. See Lowndes, p. 21. The operation of the rule as thus laid down may, of course, be excluded by special agreement; the matter is frequently regulated by the adoption of the York-Antwerp Rules, 1890. See Scrutton, *Charter-parties* (9th ed.), art. 120 and Appendix IV.; *Chelley v. Royal Commission on Sugar Supply* (1921), 37 T. L. R. 588, (C. A.) 903; [1921] 2 K. B. 627.

- (2) when the voyage is not so completed, by the law of the place where the voyage is rightly (*n*) broken up and the ship and cargo part company.

Comment.

“The adjustment of a general average at the port of discharge, according to the law prevailing there, is binding upon the ship-owner and the merchant as they must be taken to have assented to adjustment being made at the usual and proper place, and as a consequence according to the law of that place” (*o*). The port of discharge, however, need not necessarily be that of destination, if for sufficient reason the voyage is broken up and the ship and cargo part company at some other port (*p*).

This Rule is in fact an application of the principle that the proper law of a contract as to the mode of performance is the law of the country where the performance is to take place (*q*). The intention of the parties is that the average adjustment shall be made, *i.e.*, the contract as to this matter be performed, at the place where the voyage rightly terminates. It is, therefore, presumably their intention that the adjustment be governed by the law of such place.

RULE 169.—An underwriter is bound by an average adjustment duly taken according to the law of the place of adjustment, in the absence of special agreement to the contrary (*r*).

(*n*) See *Hill v. Wilson* (1879), 4 C. P. D. 329, 333, judgment of Lindley, J.

(*o*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. (Ex. Ch.) 115, 126, *per Curiam*; *Simonds v. White* (1824), 2 B. & C. 805; *Wavertree Sailing Ship Co. v. Love*, [1897] A. C. 373, which shows that the general average need not be made up by an average adjuster at the port, so long as it is made up on the basis of the law of the port.

(*p*) Lowndes, s. 59, citing *Fletcher v. Alexander* (1868), L. R. 3 C. P. 375. See also *Hill v. Wilson* (1879), 4 C. P. D. 329; and *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481; *Mavro v. Ocean Mar. Ins. Co.* (1875), L. R. 10 C. P. (Ex. Ch.) 414. Both the latter cases refer to the liability of underwriters on policies containing the words “general average as per foreign statement.”

(*q*) See Rule 161, Sub-Rule 3, Second Presumption, p. 609, *ante*.

(*r*) See *Harris v. Scaramanga* (1872), L. R. 7 C. P. 481; *Mavro v. Ocean Mar. Ins. Co.* (1875), L. R. 10 C. P. (Ex. Ch.) 414; *The Mary Thomas*, [1894] P. (C. A.) 108; *De Hart v. Compania Anonima de Seguros “Aurora,”* [1903] 2 K. B. (C. A.) 503. In this case, as in *Harris v. Scaramanga*, the decision

Comment.

An underwriter is, of course, only affected in so far as the loss of the insured was incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against (*s*). When he is affected, then, in the absence of express stipulation, he must be bound by the rule which applies to the insured.

RULE 170.—An English insurer of goods shipped by an English merchant on board a foreign ship is not affected by the law of the flag (*t*).

Comment.

The general rule as to the law governing an underwriter's liability has been thus laid down in reference to a particular case:—

“It is no doubt competent to an underwriter on an English policy to stipulate, if he thinks fit, that such policy shall be construed and applied in whole or in part according to the law of any foreign State, as if it had been made in and by a subject of the foreign State, and the policy in question does so stipulate as regards general average; but, except when it is so stipulated, the policy must be construed according to our law, and without regard to the nationality of the vessel” (*u*).

Illustration.

A, an English merchant, effects a policy of insurance with *X*, an English underwriter, upon goods shipped in a French ship. The ship puts into port for repairs. The master gives a bottomry bond on ship, freight, and cargo. The ship and freight proving insufficient to satisfy the bond, *A* has to pay the deficiency in order to obtain possession of the goods. This, according to French law, might be a loss by perils of sea, but it is not so according to English law. If it is a loss by perils of sea, *A* has a right to recover the amount paid from *X*. The rights of *A* against *X* must be determined wholly by English law. *A* has no right to recover from *X* the amount paid to release the goods (*u*).

is dependent on the wording of the policies “per foreign statement if so made up.” Difficulties are usually avoided by the inclusion of a special “foreign adjustment clause” in the policy of insurance. Arnould, s. 997.

(*s*) See the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 66, sub-s. (6).

(*t*) *Greer v. Poole* (1880), 5 Q. B. D. 272.

(*u*) *Greer v. Poole* (1880), 5 Q. B. D. 272, per Lush, J.

(F) *PROVISIONS OF BILLS OF EXCHANGE ACT, 1882,
AS TO CONFLICT OF LAWS* (x).

Bill of Exchange.

RULE 171.—[Bills of Exchange Act, 1882, s. 2 (part) and s. 4.] In this Act, unless the context otherwise requires:—

- [1] “Acceptance” means an acceptance completed by delivery or notification (y).
- [2] “Bearer” means the person in possession of a bill or note which is payable to bearer.
- [3] “Bill” means bill of exchange, and “note” means promissory note.
- [4] “Delivery” means transfer of possession, actual or constructive, from one person to another (z).

(x) Rules 171 to 175 consist of sections of the Bills of Exchange Act, 1882, which have reference, directly or indirectly, to the conflict of laws. At the cost of some awkwardness of expression, the language of the Act is followed verbatim, except where words or figures are added. Every addition is printed within square brackets.

From the fact that Rules 171 to 175 are citations from an Act of Parliament, the law is not here, as throughout the rest of this Digest, stated in the form of Rules and Exceptions. Had this form been adhered to, the language of the Act must have been slightly varied, the sub-sections would have appeared as separate Rules, and the provisos thereto as, what they really are, exceptions to a Rule. In reference to Rules 171 to 175, the word “sub-section” is used instead of “clause” in order to emphasise the fact that each of these Rules is a statutory enactment. The illustrative comment is placed, not at the end of each Rule, but after that part of each enactment, *e.g.*, sub-section, which the comment most naturally follows.

The reader is especially referred to Chalmers’ Digest of the Law of Bills of Exchange (8th ed.), 1919: it is an elaborate and almost authoritative exposition of the law embodied in the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), as amended by 4 & 5 Geo. 5, c. 82, and 7 & 8 Geo. 5, c. 48. With Sir M. D. Chalmers’ permission, use has been made of his commentary and illustrations, and in fact, wherever it was possible, his treatise has been followed. For valuable criticism on the Act, see Westlake (5th ed.), ss. 227—234. Compare also E. G. Lorenzen, *The Conflict of Laws relating to Bills and Notes* (Yale University Press), 1919.

(y) See Bills of Exchange Act, 1882, s. 2, and compare s. 21; Chalmers (8th ed.), pp. 3, 53; *Smith v. McClure* (1804), 5 East, 476.

(z) Chalmers, pp. 5, 58.

- [5] "Holder" means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof (*a*).
- [6] "Indorsement" means an indorsement completed by delivery (*b*).
- [7] "Issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder (*c*).
- [8] "Person" includes a body of persons, whether incorporated or not.
- [9] "Value" means valuable consideration (*d*).
- [10] "Written" includes printed, and "writing" includes print.
- [11] (1) An inland bill is a bill which is or on the face of it purports to be
 - (a) both drawn and payable within the British Islands, or
 - (b) drawn within the British Islands upon some person resident therein.

Any other bill is a foreign bill.

(*a*) Conf. Bills of Exchange Act, 1882, s. 38, as to "rights of holder;" s. 29, "as to holder in due course;" and s. 31, as to "negotiation." See Chalmers, pp. 5, 142; 103, 121.

(*b*) See Chalmers, p. 6, and compare s. 21, Chalmers, p. 58.

(*c*) Chalmers, p. 7. "For stamp purposes, a bill is not to be deemed to be issued until it has reached the hands of a holder for value." Chalmers, pp. 7 and 247.

(*d*) For definition of "valuable consideration," see further, Bills of Exchange Act, 1882, s. 27:

"(1) Valuable consideration for a bill may be constituted by—

"(a) Any consideration sufficient to support a simple contract;

"(b) An antecedent debt or liability. Such a debt or liability is
"deemed valuable consideration, whether the bill is payable on demand or at a future time.

"(2) Where value has at any time been given for a bill, the holder is
"deemed to be a holder for value as regards the acceptor and all
"parties to the bill who became parties prior to such time.

"(3) Where the holder of a bill has a lien on it arising either from contract
"or by implication of law, he is deemed to be a holder for value
"to the extent of the sum for which he has a lien."

For the purposes of this Act, "British Islands" mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of Her Majesty.

(2) Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill (e).

Comment.

As to Rules taken from the Bills of Exchange Act, 1882.—Any conflict of laws with regard to bills of exchange is now determined by the Bills of Exchange Act, 1882, in so far as that statute applies. The Act, however, is not exhaustive (f), and the sections relating to the conflict of laws do not settle all the questions of private international law in regard to a bill which might be raised in an English Court. These sections follow in the main the principles laid down in the preceding Rules of this Digest. The Bills of Exchange Act reproduces, for the most part, the effect of decided cases which themselves are in conformity with the principles of private international law adopted by English Courts, and which, though decided before the passing of the Act, may still with advantage be consulted (g).

The passing of the Bills of Exchange Act gives, it is submitted, no reason for altering the opinion published some years ago (h)

(e) See Chalmers, pp. 17, 311.

(f) *Ex parte Robarts* (1886), 18 Q. B. D. (C. A.) 286.

(g) See *Burrows v. Jemino* (1726), 2 Strange, 733; *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Kearney v. King* (1819), 2 B. & Ald. 301; *Wynne v. Jackson* (1826), 2 Russ. 351; *Don v. Lippmann* (1837), 5 Cl. & F. 1; *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385; *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151; *Cooper v. Waldegrave* (1840), 2 Beav. 282; *Rothschild v. Currie* (1841), 1 Q. B. 43; *Allen v. Kemble* (1848), 6 Moore, P. C. 314; *Ralli v. Dennistoun* (1851), 6 Ex. 483; *Gibbs v. Fremont* (1853), 9 Ex. 25; *Sharples v. Rickard* (1857), 2 H. & N. 57; *Suse v. Pompe* (1860), 8 O. B. (N.S.) 538; *Scott v. Pilkington* (1862), 2 B. & S. 11; *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340; *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77; *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538; (1870), L. R. 5 C. P. (Ex. Ch.) 473; *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; *Goodwin v. Robarts* (1876), 1 App. Cas. 476; *Williams v. Ayers* (1877), 3 App. Cas. 133; *Horne v. Rouquette* (1878), 3 Q. B. D. (C. A.) 514; *In re Marselles, & Co.* (1885), 30 Ch. D. 598; *Alcock v. Smith*, [1892] 1 Ch. (C. A.) 238.

(h) See A. V. Dicey, "Conflict of Laws and Bills of Exchange," *American Law Review*, July, 1882.

that the rules determining the rights and liabilities of the different parties to a bill are, as regards the conflict of laws, with rare exceptions, the applications of two principles—first, that the formal validity of a contract is determined by the law of the country where the contract is made (*i*); and secondly, that the interpretation of a contract and the rights and obligations arising under it are determined in accordance with the law to which the parties may be presumed to have intended to submit themselves, *i.e.*, the proper law of the contract (*k*).

RULE 172 (*l*).—[Bills of Exchange Act, 1882, s. 72.] Where a bill drawn in one country is negotiated (*m*), accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:—

- (1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity, as regards requisites in form, of the supervening contracts, such as acceptance, or indorsement, or acceptance *suprà* protest, is determined by the law of the place where such contract was made

Provided that—

- (a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in

(*i*) See Rule 159, p. 583, *ante*.

(*k*) See Rule 161, p. 602, *ante*.

(*l*) Chalmers (8th ed.), pp. 274—288; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. (C. A.) 623.

(*m*) “(1) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

“(2) A bill payable to bearer is negotiated by delivery.

“(3) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

“(4) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee, in addition, acquires the right to have the indorsement of the transferor.

“(5) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.” (Bills of Exchange Act, 1882, s. 31.)

accordance with the law of the place of issue :

- (b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

Comment.

Bill of exchange and conflict of laws.—A bill of exchange is an instrument embodying, not one contract, but a series of different though interconnected contracts; or may, perhaps, be more accurately described as a congeries of contracts hanging on to one original contract, which always has a certain effect on the others. The instrument no doubt has, as a whole, certain peculiarities. It exists for one object, namely, to secure to the holder the payment in due course of the sum for which the bill is drawn; but the several contracts entered into for this purpose by the drawer, the acceptor, and the indorser respectively, and therefore the several rights and liabilities of each of these parties, are distinct and different. This is a matter which ought not to be overlooked, for many difficulties which have perplexed judges and text-writers, when called upon to deal with the conflict of laws in reference to the rights or obligations of the parties to a bill, have arisen from the habit of regarding a bill as a single contract, instead of regarding it as what it really is,—an instrument containing several distinct contracts. These several contracts have one feature in common: they are each perfected by delivery (*n*). This matter becomes of consequence when we are called upon to determine what is the place at which the contract of a party to a bill, say the acceptor or the indorser, is made or completed.

A bill is clearly an instrument which from its nature is likely to give rise to a conflict of laws. It may be drawn in one country, *e.g.*, France; be accepted in another, *e.g.*, England; be indorsed

(*n*) See Bills of Exchange Act, 1882, s. 21; and Chalmers (8th ed.), pp. 58—62 and notes.

in a third, *e.g.*, Belgium; and be payable in a fourth, *e.g.*, Germany. The law of each of these countries may, conceivably at any rate, affect the validity of the bill, or the rights or obligations of the parties to it. It may be necessary to determine, as in the case of other contracts, whether the bill, or a contract embodied in the bill, is valid as regards its *form*, and what therefore is the law determining its formal validity. It may be further necessary to determine what are the rights or obligations of each of the parties to a bill, and therefore to determine what is the law governing the *interpretation* and *obligation* of each contract.

Form.—Sub-section 1 deals with the *formal validity* of a bill and of each contract contained in it.

The principle laid down in this sub-section, independently of the provisos by which the effect of the sub-section is modified, exactly corresponds with Rule 159 (*o*). The formal validity of a bill and of the several contracts contained therein depends on the law of the country where each contract is made or completed. Hence the validity of the bill itself is governed by the law of the place of issue, *i.e.*, by the law of the place where the bill, being complete in form, is first delivered to a person who takes it as holder (*p*); the formal validity of the acceptance is determined by the law of the place where the acceptor's contract is complete.

The provisos are in reality exceptions to the principles enunciated in sub-section 1.

As to proviso (a). Independently of the Bills of Exchange Act, 1882, it would seem that where a bill issued abroad is, on account of its not being stamped in accordance with the law of the place of issue, *absolutely void* and not merely inadmissible in evidence at the place of issue, it would be void in England (*q*). Under the Act, however, such a bill is now clearly not invalid in the United Kingdom for want of the stamp with which it ought to have been stamped in the country, *e.g.*, France, where it was issued.

This proviso, however, applies only to invalidity arising from the want of the stamp. It has no reference to any other cause of invalidity.

As to proviso (b). This second proviso, again, is a partial deviation from the principle that the formal validity of a contract

(*o*) See p. 583, *ante*.

(*p*) *Horne v. Rouquette* (1878), 3 Q. B. D. (C. A.) 514, 515, 521, 523.

(*q*) See *Clegg v. Levy* (1812), 3 Camp. 166; *Bristow v. Sequeville* (1850), 5 Ex. 275; Chalmers (8th ed.), p. 276.

depends on the law of the place where it is made. Under it a bill, which for defect of form is void in the country where it is issued, may be valid in the United Kingdom; and so, again, it would seem, an indorsement or acceptance invalid in respect of form, by the law of the country where it takes place, might be valid in the United Kingdom.

The validity, however, of a bill under this proviso is subject to three limitations:—

First. It must conform, as regards requisites in form, to the law of the United Kingdom.

Secondly. It can be treated as valid only for the purpose of enforcing payment.

Thirdly. The bill is to be treated as valid only between persons who negotiate, hold, or become parties to it in the United Kingdom.

Illustrations.

Sub-section 1.

1. By German law a bill need not express the value received. By French law it must. A bill drawn in Germany, but payable in Paris, which does not express the value received, is valid.

2. By the law of Illinois a verbal acceptance is valid. A bill drawn in London on a town in Illinois is verbally accepted there. The acceptance is valid (*r*).

Proviso (a).

3. A bill is issued in a foreign country. It is not stamped, as required by the law of such country, and is therefore void there. It is not on this account invalid in England (*s*).

Proviso (b).

4. A bill is drawn in France by a domiciled Frenchman in the French language, in an English form (and indorsed in blank), on an English company, by whom the bill is accepted payable in London. As regards the acceptor the bill is an English bill, and is to be treated as valid. The effect under French law of an indorsement in blank is immaterial (*t*).

(*r*) See Chalmers, p. 275.

(*s*) But, though negotiated in a foreign country, a bill issued unstamped in England is invalid. *Bank of Montreal v. Exhibit & Trading Co., Ltd.* (1906), 22 T. L. R. 722.

(*t*) See *Smallpage's & Brandon's Cases* (1885), 30 Ch. D. 598. The case refers

5. A bill drawn and payable in France expresses no value received, and is therefore invalid according to French law. It is indorsed in England. The indorser could be sued here (*u*) under proviso (*b*), though the drawer could not.

(2) Subject to the provisions of this Act (*x*), the interpretation of the drawing, indorsement, acceptance, or acceptance *suprà* protest of a bill is determined by the law of the place where such contract is made (*y*).

Provided that where an inland bill is indorsed in a foreign country [*i.e.*, a country not forming part of the British Islands] (*z*), the indorsement shall as regards the payer, be interpreted according to the law of the United Kingdom (*a*).

Comment.

On this sub-section the remarks of Sir M. Chalmers merit particular attention.

"The term 'interpretation,'" he writes, "in this sub-section, it 'is submitted, clearly includes the obligations of the parties as 'deduced from such interpretation (*b*).

to bills made before the passing of the Bills of Exchange Act, 1882, but, at any rate, if the acceptance took place in London, is an illustration of proviso (*b*). See Chalmers, p. 275, note (*o*).

(*u*) Cf. *Wynne v. Jackson* (1826), 2 Russ. 351, 634. See Chalmers, p. 275.

(*x*) The provisions referred to are the remaining sub-sections of the Bills of Exchange Act, 1882, s. 72, or, in other words, the other sub-sections or clauses of Rule 163, and also possibly the Bills of Exchange Act, 1882, ss. 15, 53 (see Chalmers, p. 276, note (*x*)), which do not, however, appear to have any very direct bearing on the conflict of laws. Thus sect. 53 refers to a difference between the law of England and the law of Scotland in respect of the effect of a bill as an assignment of a fund in the hands of a drawee.

(*y*) *Allen v. Kemble* (1848), 6 Moore, P. C. 314; *Horne v. Rouquette* (1878), 3 Q. B. D. (C. A.) 514, 520, judgment of Brett, L. J.

(*z*) Compare definition of "British Islands," p. 634, *ante*, taken from the Bills of Exchange Act, 1882, s. 4. Note that "British Islands" includes more than the United Kingdom. Note also that "foreign" is here used in a sense different from, and less extensive than, the sense given it in the other Rules in this Digest. See pp. 67, 71, *ante*.

(*a*) *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77.

(*b*) Compare Westlake (5th ed.), s. 229; *Burrows v. Jemino* (1726), 2 Strange, 733; *Cooper v. Waldegrave* (1840), 2 Beav. 282.

"Story (c), s. 154, points out the reasons of the rule adopted in this sub-section. 'It has sometimes been suggested,' he says, 'that this doctrine is a departure from the rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity with that rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and, in default of such payment, they agree upon due notice to reimburse the holder in principal and damages when they respectively entered into the contract.'

"The case of a bill accepted in one country but payable in another gives rise to a difficulty. Suppose a bill is accepted in France, payable in England. Perhaps the maxim, *Contrariusse unusquisque in eo loco intelligitur in quo ut solveret se obligavit*, would apply. But if not, then comes the question, what is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the *lex loci solutionis* would be regarded: cf. *Nouguier*, s. 1419" (d).

It is therefore doubtful whether, when a bill is accepted in one country, e.g., England, and made payable in another, e.g., France, the obligations of the acceptor are governed, as the words of the section strictly taken imply, by the law of the country where the bill is accepted (*lex loci contractus*), or, as they ought to be on principle (e), by the law of the country where the bill is made payable (*lex loci solutionis*).

The probable explanation of this difficulty is curious. Story's expressions (f) have apparently suggested the terms of sub-section 2. Story's language may be read, and probably was read by the persons engaged in considering the bill, as meaning that the obligations of the parties to a bill are governed by the law of the place where each party contracts. But this is not his real meaning; he clearly intends to lay down, though in a very roundabout way, that each contract embodied in a bill is to be interpreted by the law of the country where it is to be performed (*lex*

(c) Story, Commentary on the Law of Bills of Exchange.

(d) Chalmers, pp. 277, 278. The matter is left undetermined in *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. 623, 634, 670.

(e) Compare *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525.

(f) Compare Story, Commentary on the Law of Bills of Exchange, ss. 153, 154.

loci solutionis). Unfortunately the language of sub-sect. (2) reproduces the words rather than the meaning of Story. The result is that, if the terms of the sub-section be strictly interpreted, the obligations of an acceptor are to be governed, not, as Story intended, by the *lex loci solutionis*, but by the *lex loci contractus*. Sir M. Chalmers' suggestion to some extent meets the objections to this result, but it may be doubted whether his suggestion is not in conformity rather with the doctrine of Story, when properly understood, than with the language of the Bills of Exchange Act, 1882, s. 72, sub-s. (2).

Illustrations.

1. An English note payable to bearer is negotiated by delivery in a country where this mode of transfer is not recognized. The title to the note passes by such delivery (*g*).

2. Action in England on a bill drawn in Belgium and indorsed in blank in France. The effect of such indorsement is determined according to French law, *i.e.*, it operates as a "procuration" (*h*).

3. A general acceptance given in Paris is to be interpreted according to French law (*i*).

4. A bill drawn in Belgium on England is indorsed in France in blank. The indorsement is (perhaps) to be interpreted according to French law as regards the indorser (*k*).

5. A bill payable to order, drawn, accepted, and payable in England, is indorsed in France. The indorsement by the law of France is held to give no right to the indorsee to sue in his own name. The indorser (who is also drawer and payee) and the indorsee are, at the time the bill is made, subjects of and domiciled and resident in France. The indorsee can nevertheless maintain an action in England on the bill against the acceptor (*l*).

(*g*) *De la Chaumette v. Bank of England* (1831), 2 B. & Ad. 385; Chalmers (8th ed.), p. 276.

(*h*) *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151. Conf. Nonguiet, ss. 747—760; *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538, per Willes, J.; (1870), L. R. 5 C. P. (Ex. Ch.) 473. See Chalmers, p. 276, note (*b*).

(*i*) Conf. *Don v. Lippmann* (1837), 5 Cl. & F. 1, 12, 13. And see *Wilde v. Sheridan* (1852), 21 L. J. Q. B. 260.

(*k*) *Bradlaugh v. De Rin* (1868), L. R. 3 C. P. 538; (1870), L. R. 5 C. P. (Ex. Ch.) 473. Compare Chalmers, p. 276. In the Exchequer Chamber the view of the effect of French law taken in *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151, was questioned.

(*l*) *Lebel v. Tucker* (1867), L. R. 3 Q. B. 77. This would appear to follow from the Bills of Exchange Act, 1882, s. 72, sub-s. (2), proviso. But the case,

6. A bill drawn by *A*, an Englishman domiciled in England, on *X*, a Frenchman domiciled in France, is made payable in France, but is accepted by *X* in England. Whether *X*'s liabilities under the bill are governed by the law of England or by the law of France? (*m*).

- (3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured (*n*).

Comment.

The language of this sub-section is obscure. It should probably be construed *reddendo singula singulis*. The words "act is done" refer to presentment for acceptance or payment; the words "bill is dishonoured" refer to protest and notice of dishonour. As pointed out by Westlake (*o*), the word "act" presumably includes omission, and "holder" must mean the last holder.

Illustrations.

1. *X* indorses to *A* in England a bill payable in Paris. *A* indorses it to a Frenchman, who on dishonour protests it, and transmits notice of protest to *X*, in accordance with French law. *A* can recover from *X* though he has not given him notice of dishonour according to English law (*p*).

2. A bill is drawn in England payable in Spain. It is indorsed in England by *X* to *A*. *A* indorses it to *M*. It is dishonoured by non-acceptance, and twelve days afterwards *M* gives notice of this to *A*. *A* at once gives notice to *X*. By Spanish law, no notice of dishonour by non-acceptance is required. *A* can recover from *X* (*q*).

decided before the passing of the Act, depends on the principle that the contract of an acceptor who accepts in England is to pay an order valid by the law of England.

(*m*) See pp. 640, 641, *ante*.

(*n*) Compare Chalmers, pp. 280, 281; and Westlake (5th ed.), ss. 231, 232.

(*o*) Westlake, s. 231. See *Rothschild v. Currie* (1841), 1 Q. B. 43.

(*p*) *Hirschfeld v. Smith* (1866), L. R. 1 C. P. 340.

(*q*) *Horne v. Rouquette* (1878), 3 Q. B. D. (C. A.) 514; Chalmers, p. 281.

- (4) Where a bill is drawn out of, but payable in, the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts^(r) at the place of payment on the day the bill is payable^(s).

Illustration.

A bill for 1,000 francs, payable three months after date, is drawn in France on London. The amount in English money the holder is entitled to receive is determined by the rate of exchange on the day the bill is payable^(t).

- (5) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable^(u).

Illustrations.

1. By English law, days of grace are allowed on bills payable after date. By French law, they are not. A bill drawn in Paris on London is entitled to three days of grace, whilst a bill drawn in London on Paris is not entitled to any days of grace^(x).

2. A bill is drawn in England payable in Paris three months after date. After it is drawn, but before it is due, a "moratory" law is passed in France, in consequence of war, postponing the maturity of all current bills for one month. The maturity of this bill is for all purposes to be determined by French law^(y).

^(r) See Bills of Exchange Act, 1882, s. 10, and Chalmers, p. 33.

^(s) Bills of Exchange Act, 1882, s. 72, sub-s. (4); Chalmers, p. 281.

^(t) Chalmers, p. 281.

^(u) Bills of Exchange Act, 1882, s. 72, sub-s. (5); Chalmers, pp. 281, 282.

^(x) Chalmers, p. 282.

^(y) See Chalmers, p. 282; *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; *In re Francke and Rasch*, [1918] 1 Ch. 470 (moratorium in Germany). See also *Burrows v. Jemino* (1726), 2 Str. 733.

RULE 173.—[Bills of Exchange Act, 1882, s. 57.] Where a Bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows :—

- (1) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser,—
 - (a) The amount of the bill :
 - (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case :
 - (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- (2) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange, with interest thereon until the time of payment (z).
- (3) Where by this Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part; and where a bill is expressed to be payable with interest at a given rate, interest as damages may or

(z) *Mellish v. Simeon* (1794), 2 H. Bl. 378; *Suse v. Pompe* (1860), 8 C. B. (N. S.) 538; *Willans v. Ayers* (1877), 3 App. Cas. 133, 146.

may not be given at the same rate as interest proper (a).

Comment.

The word "abroad" is not defined in the Bills of Exchange Act, 1882. It probably here means outside the British Islands, as the "British Islands" (b) are defined in s. 4 of the Act.

The following points should be noted:—

First. When a bill, wherever drawn, is dishonoured within the British Islands, the measure of damages recoverable is to be determined in accordance with sub-s. (1), and this sub-section refers exclusively to bills dishonoured at home (c). When a bill, wherever drawn, is dishonoured abroad, *i.e.*, outside the British Islands, then the amount recoverable is the amount of the re-exchange, with interest thereon until the time of payment.

Secondly. "Re-exchange" in its usual application, means the "loss resulting from the dishonour of a bill in a country different to that in which it was drawn or indorsed. The re-exchange is ascertained by proof of the sum for which a sight bill (drawn at the time and place of dishonour at the *then rate of exchange* on the place where the drawer or indorser sought to be charged resides) must be drawn in order to realize at the place of dishonour the amount of the dishonoured bill and the expenses consequent on its dishonour. The expenses consequent on dishonour are the expenses of protest, postage, customary commission and brokerage, and, when a re-draft is drawn, the "price of the stamp" (d).

Thirdly. Sect. 57 (reproduced in Rule 173) determines most of the questions which can arise as to the damages recoverable on a dishonoured bill. The cases, therefore, decided before the Act came into force are for the most part useless. The principle which they on the whole suggest is, that "the place at which each party to a bill or note undertakes that *he himself* will pay it [*lex loci*

(a) Chalmers, pp. 217—222. See, as to how far damages are recoverable on a writ specially indorsed, *London, & Co. Bank v. Earl of Clancarty*, [1892] 1 Q. B. 689; *Dando v. Boden*, [1893] 1 Q. B. 318.

(b) For term "British Islands," see Rule 171, p. 634, *ante*.

(c) *Ex parte Roberts* (1886), 18 Q. B. D. (C. A.) 286, 292, *per Curiam*; *In re Commercial Bank of South Australia* (1887), 36 Ch. D. 522, 527; and see *In re English Bank of the River Plate*, [1893] 2 Ch. 438.

(d) Chalmers, pp. 220, 221. See, further, the whole passage in Chalmers, of which this is a part.

"*solutionis*"] determines with regard to him the *lex loci contractus* "according to which his liability is governed" (e); or, in other words, that the damages due from the party to a bill are determined by the proper law of his contract (f). This rule is in conformity with the general principles as to the law governing liability under a contract (f), but cannot (it is submitted) be always acted upon in cases coming within s. 57. Thus, if Y draws a bill in France made payable and accepted by X in England, and indorses it to A in France, and the bill is dishonoured by X in England, the damages recoverable in an action in England by A against Y are to be determined by sub-s. (1), without any respect to the damages which may be recoverable against Y under the law of France.

Note, however, that the provisions of s. 57 are not exhaustive. Hence a foreign drawer of a bill accepted and dishonoured in England, who has paid re-exchange calculated according to the foreign law governing his contract, may recover it from the English acceptor, and if he is liable for the re-exchange he may prove for it in bankruptcy against the acceptor's estate before the actual payment (g).

Illustration.

X draws in England a bill on M at Vienna, payable there, for £750. X indorses the bill in England to A. M accepts the bill, but it is dishonoured. A is entitled to recover from X the re-exchange, *i.e.*, the value of the foreign coin expressed in English money at the rate of exchange, with interest and expenses (h).

Promissory Note.

RULE 174.—[Bills of Exchange Act, 1882, s. 83 (1).]
A promissory note is an unconditional promise in writing

(e) Mayne, *Damages* (4th ed.), p. 234, cited Chalmers, p. 279.

(f) For the meaning of the term "proper law," see Rule 155, p. 572, *ante*.

(g) *Ex parte Roberts* (1886), 18 Q. B. D. (C. A.) 286.

The Bills of Exchange Act, 1882, does not deal with the law determining the validity and effect of a discharge from liability under a bill of exchange. This is regulated by the law in reference to discharge of contracts generally. See Rule 162, p. 615, *ante*, under which the validity and effect of a discharge depends, speaking generally, on the proper law of the contract. Compare, however, Chalmers, p. 279.

(h) *Suzé v. Pompe* (1860), 8 C. B. (N. S.) 538; 30 L. J. C. P. 75; *Manners v. Pearson*, [1898] 1 Ch. (C. A.) 581.

made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer (*i*).

Illustrations.

1. An I. O. U. containing a promise to pay may constitute a note (*k*).

The following are invalid as notes:—

2. “Borrowed of *C* 100*l.* to account for on behalf of the *X* Club at — months’ notice if required.” (Signed) *T. B.* (*l*).

3. “I. O. U. 20*l.* for value received.” (Signed) *W. B.* (*m*).

4. “Nine years after date I promise to pay *C* 100*l.*, provided *X* shall not return to England, or his death be certified in the mean time.” (Signed) *W. B.* (*n*).

RULE 175.—[Bills of Exchange Act, 1882, s. 89.]

(1) Subject to the provisions in this part [*i.e.*, Part IV. (*o*) of the Bills of Exchange Act, 1882], and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

(2) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer’s order.

(*i*) Chalmers, p. 306.

This is the definition of a British note for other than stamp purposes, but it is not the definition of a foreign note. A foreign note must conform to foreign law in form—*i.e.*, to the law of the country where the note is made.

(*k*) *Brooks v. Elkins* (1836), 2 M. & W. 74.

(*l*) *White v. North* (1849), 3 Ex. 689.

(*m*) *Gould v. Coombs* (1845), 1 C. B. 543.

(*n*) *Morgan v. Jones* (1830), 1 C. & J. 162. See Chalmers, p. 307.

(*o*) Part IV. of the Bills of Exchange Act, 1882, ss. 83—89, refers to promissory notes.

- (3) The following provisions as to bills do not apply to notes; namely, provisions relating to—
- (a) Presentment for acceptance;
 - (b) Acceptance;
 - (c) Acceptance *suprà* protest;
 - (d) Bills in a set.
- (4) Where a foreign note is dishonoured, protest thereof is unnecessary.

Comment.

The effect of this Rule, which reproduces the Bills of Exchange Act, 1882, s. 89, is that Rules 171 to 173 (*p*), reproducing parts of the Bills of Exchange Act, 1882, are applicable to promissory notes no less than to bills, subject to the general provisions of the Bills of Exchange Act, 1882, and the particular provisions of this Rule.

(G) NEGOTIABLE INSTRUMENTS GENERALLY.

RULE 176 (*q*).—Any instrument for securing the payment of money, *e.g.*, a bill of exchange or a government bond, whether foreign or English, may be made a negotiable instrument either—

- (1) by custom of the mercantile world in England, which custom may, if well established, be of recent origin; or
- (2) by Act of Parliament.

A “negotiable instrument” means an instrument for securing the payment of money which has the following characteristics:—

- (a) The property in the instrument and all the rights

(*p*) See pp. 632—644, *ante*.

(*q*) Compare *Rumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194; *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; and see judgment in Court below (1888), 38 Ch. D. 388; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144; *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515; *Guaranty Trust Co. of New York v. Hannay*, [1918] 2 K. B. (C. A.) 623. Note that *Crouch v. Credit Foncier of England* (1873), L. R. 8 Q. B. 374, must be considered as overruled by *Goodwin v. Roberts* (1876), 1 App. Cas. 476.

under it pass to a *bonâ fide* holder for value by mere delivery to him.

(b) In the hands of such holder the property in and the rights under such instrument are not affected by defects in the title of or defences available against the claims of any prior transferor or holder.

RULE 177 (r).—No instrument, whether English or foreign, is a negotiable instrument in England unless it is made so either by custom of the mercantile world in England, or by Act of Parliament.

Comment.

The nature (s) and characteristics of a negotiable instrument have been thus broadly summarised: "A negotiable instrument payable to bearer is one which, by the custom of trade [or under statute] passes from hand to hand by delivery, and the holder of which for the time being, if he is a *bonâ fide* holder for value without notice, has a good title, notwithstanding any defect of title in the person from whom he took it" (t).

From the judicial statement, combined with the language of Rules 176 and 177, a student may collect the general features marking any instrument (e.g., a promissory note or bill of exchange) which in England is "negotiable" in the strict sense of that term. First, the property in the instrument (e.g., the promissory note), and all rights under it pass by mere *delivery* to the person (called the holder) to whom the note is delivered (u). Secondly, the holder for value (x) who receives the note *bonâ fide* (that is, without notice or knowledge of any defect in the title of

(r) See note (g) to Rule 176, p. 648, *ante*.

(s) For a detailed account thereof, see, e.g., Pollock, *Principles of Contract* (8th ed.), pp. 240—245.

(t) *Simmons v. London Joint Stock Bank*, [1891] 1 Ch. (C. A.) 270, 294, *per Curiam*. The decision in this case is reversed (*London Joint Stock Bank v. Simmons*, [1892] A. C. 201), but the reversal does not affect the passage cited.

(u) See *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515.

(x) The value need not be paid by the holder himself. It is sufficient if value has been given for the note by some person who has held it before the last holder. X, the maker of a promissory note, gives it as a present to A. A receives value for it from B. B gives the note as a present to C, who pays nothing for it. C is a *bonâ fide* holder for value.

the person who transfers it to him), has a perfectly *good title* to the note, however defective may be the title of the transferor, who may, for example, have actually stolen the note and have no property in it at all, or in the title of those from whom the transferor has obtained the note. And the *bonâ fide* holder further, just because he obtains a good title to the note and all rights under it, is, when he demands payment thereof, not exposed to having his claim met by defences available against the transferor, *e.g.*, that though the transferor has a right to be paid the amount due on the note, say 100*l.*, by the maker of the note, the transferor himself owes 100*l.* to the maker which the maker of the note could, in an action by the transferor, set off against the transferor's claim. Thirdly, the note may be transferred by one *bonâ fide* holder for value to another, who immediately on receiving it acquires himself a full title to the property in the note and to all rights under it (*y*).

The thing which it is really essential to remember is that a strictly "negotiable" instrument, *e.g.*, a promissory note or a bank note, is, as far as the nature of things admits, transferable, like cash, by delivery. No doubt its actual value depends upon the degree of certainty one can entertain that the person who binds himself by a negotiable instrument to the payment, *e.g.*, of 100*l.*, will be able and ready to pay it. When, as in the case of a note issued by the Bank of England, the payment of money in exchange for it is practically certain, a negotiable instrument does possess not only the characteristics but the value of money.

Add further that under the law of England instruments of the most different kinds (*e.g.*, bills of exchange, promissory notes, Bank of England notes, or bonds issued by foreign governments

(*y*) It is sometimes alleged to be an additional feature of negotiability that a negotiable instrument is one which can always be put in suit by the party holding it. See *Crouch v. Crédit Foncier of England* (1873), L. R. 8 Q. B. 374, 381, 382, judgment of Blackburn, J. But this statement, in so far as it is true, is simply part of the fact that a *bonâ fide* holder, to whom, *e.g.*, a promissory note has been delivered, acquires thereby all the rights under the note of the prior holder, from whom he has taken it. And the statement itself, as has been pointed out, is not in all cases quite accurate. A foreign sovereign may issue bonds, which are by custom negotiable in England, and may promise under them to repay 100*l.* borrowed on each of them; yet no foreign sovereign can be sued in England for the failure to pay the money due under such bond. For this criticism, see Chalmers (8th ed.), p. 363. See *Twycross v. Dreyfus* (1877), 5 Ch. D. (C. A.) 605, 616, per Jessel, M. R.; 618, per James, L. J.; *Goodwin v. Roberts* (1875), L. R. 10 Ex. 337, 344; *Ex parte Huggins* (1882), 21 Ch. D. (C. A.) 85, 90, per Jessel, M. R.

or by English and foreign companies) may, provided only that the rights given thereby can pass by delivery, be negotiable instruments.

Our main business, however, in this work is to note in regard to negotiable instruments several points which specially concern or touch upon the conflict of laws.

(1) Instruments which are "negotiable" in England owe their negotiability either to Act of Parliament (as is now the case with bills of exchange in virtue of the Bills of Exchange Act, 1882) or to English mercantile custom (as is the case with negotiable instruments, *e.g.*, bonds issued by foreign governments or by English or foreign companies) (*z*).

(2) The custom which in England makes an instrument negotiable has two peculiarities: It must, in the first place, be the custom of the English mercantile world; it may, in the second place, provided its existence be well established, have grown up within a very few years.

"It is no doubt true that negotiability can only be attached to a contract by the law merchant or by a statute; and it is also true that, in determining whether a usage has become so well established as to be binding on the Courts of law, the length of time during which the usage has existed is an important circumstance to take into consideration; but it is to be remembered that in these days usage is established much more quickly than it was in days gone by; more depends on the number of the transactions which help to create it than on the time over which the transactions are spread; and it is probably no exaggeration to say that nowadays there are more business transactions in an hour than there were in a week a century ago. Therefore the comparatively recent origin of this class of securities" [debenture bonds issued by an English company in England and by foreign companies abroad, and expressed to be payable to bearer, and not being promissory notes]. "in my view creates no difficulty in the way of holding that they are negotiable by virtue of the law

(*z*) *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515.

Mercantile custom is apparently the creator, as a matter of history, of all instruments recognized as negotiable in England. Many of them are now negotiable under Act of Parliament, but they were treated as negotiable by the English mercantile world, and their negotiability was recognized by the Courts long before it was enacted by statute. Parliament, it is conceived, has rarely, if ever, conferred negotiability on any instrument which has not been treated as negotiable by English mercantile custom.

“merchant; they are dealt in as negotiable instruments in every minute of a working day, and to the extent of many thousands of pounds. It is also to be remembered that the law merchant” [created as it really is by custom] “is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Cockburn, C. J., in *Goodwin v. Roberts (a)*, capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of trade. . . . Thus it has been found convenient to treat securities like those in question in this action as negotiable, and the Courts of law, recognizing the wisdom of this usage, have incorporated it in what is called the law merchant, and have made it part of the common law of the country. In my opinion the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in our Courts. The existence of the usage has been so often proved and its consequence is so obvious that it must be taken now to be part of the law; the very expression ‘bearer bond’ connotes the idea of negotiability, so that the moment such bonds are issued to the public they rank themselves among the class of negotiable securities” (b).

(3) No instrument is in England a negotiable instrument which is not made so either by Act of Parliament, or by the custom of the English mercantile world.

Hence no instrument can be made strictly negotiable by mere agreement between the parties to it that it shall have the character of negotiability; “mere private agreement or *particular* custom cannot be admitted as part of the law merchant so as to introduce new kinds of negotiable instruments” (c). Hence, too, instruments which are negotiable in a foreign country (*e.g.*, bonds issued by a foreign Government) are not on that account negotiable in England unless they have become negotiable by the custom of the English mercantile world.

In most of the reported cases involving the question, whether

(a) L. R. 10 Ex., at p. 346.

(b) *Edelstein v. Schuler & Co.*, [1902] 2 Q. B. 144, 154, 155, judgment of Bigham, J.; and see *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658.

(c) See Pollock, *Principles of Contract* (8th ed.), p. 243.

given instruments were negotiable, the point at issue has been whether a *bonâ fide* holder who has given value for an instrument, e.g., a bond, which has been stolen or obtained fraudulently from its owner, has a right to retain it against such owner, and the answer to this question has depended upon the reply to the inquiry whether the instrument was or was not negotiable (*d*). This should be borne in mind in reading the Illustrations of Rules 176 and 177.

Illustrations.

1. A Bank of England note is stolen by *N* from *A*. *N* pays it away to *X*, who receives it *bonâ fide* for value. The property in the note passes to *X* on delivery. *X* is entitled to retain the note as against *A* (*e*).

2. Scrip issued by the Russian Government is purchased for *A* by his broker *N*, in whose hands *A* leaves it. *N* fraudulently deposits the scrip with *X*, a banker, who takes it *bonâ fide*, as security for a loan to *N*. Under the custom of merchants in England this Russian scrip is treated as a negotiable instrument. It is a negotiable instrument, and *X* is entitled to retain the scrip as against *A* (*f*).

3. An inland bill of exchange is stolen by *N* from *A*. It is paid away for value to *X*, a money-changer, who takes it *bonâ fide*. It is a negotiable instrument. *X* is entitled to retain it as against *A*.

4. *A & Co.* are owners of debentures issued by an English company in England payable to bearer. By reason of the conditions imposed on the debentures they are not promissory notes. *N*, a secretary of *A & Co.*, fraudulently takes the debentures, and pledges them with *X* for a loan made by *X* to *N*. *X* takes the debentures in good faith. Such debentures have in the English mercantile world and on the Stock Exchange for many years been by mercantile custom treated as negotiable instruments transferable by mere delivery. *X* has a right to retain the debentures as against *A* (*g*).

5. Debenture bonds payable to bearer are issued by an English

(*d*) See especially *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515, 519, 520, judgment of Bowen, L. J.

(*e*) *Müller v. Race* (1757), 1 Burr. 452; 1 Sm. L. C. (10th ed.) 447.

(*f*) *Goodwin v. Roberts* (1876), 1 App. Cas. 476; *Gorgier v. Mievill* (1824), 3 B. & C. 45.

(*g*) *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q. B. 658.

company in England, and by foreign companies abroad. They are not promissory notes. They are bought by *A* and stolen from him by *N*, his clerk. They are purchased *bonâ fide* for value from a broker employed by *N* by *X & Co.*, brokers on the London Stock Exchange. Bonds of this description have been for a few years treated by the usage of the English mercantile world and of the Stock Exchange as negotiable instruments. The bonds are negotiable instruments in virtue of this usage, and *X & Co.* are entitled to retain them as against *A* (*h*).

6. Bonds are issued by the Prussian Government. They are stolen from *A*. The bonds come into the hands of *N*, by what means does not appear. *N* deposits them with *X & Co.*, English bankers, to secure an overdraft. *X & Co.* take the bonds *bonâ fide*. The bonds are negotiable instruments in Prussia, but there is no custom of merchants in this country to treat them as negotiable. *X & Co.* are not entitled to retain the bonds as against *A*, *i.e.*, though negotiable in Prussia they are not negotiable in England (*i*).

(H) INTEREST.

RULE 178.—The liability to pay interest, and the rate of interest payable in respect of a debt or loan, is determined by the proper law of the contract under which the debt is incurred or the loan is made (*k*).

Comment.

If interest is payable on a debt or loan, it must be so under the contract between the parties. Whatever law, therefore, governs the contract must determine all questions relating to interest.

(*h*) *Edelstein v. Schuler & Co.*, [1902] 2 K. B. 144.

(*i*) *Picker v. London and County Banking Co.* (1887), 18 Q. B. D. (C. A.) 515; *Williams v. Colonial Bank* (1888), 38 Ch. D. (C. A.) 388, 404, 408; *Lloyds Bank v. Swiss Bankverein* (1912), 17 Com. Cas. 280, 297.

(*k*) See Nelson, p. 279; Story, s. 291. Compare Westlake, s. 225; *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121, 140; *Arnott v. Redfern* (1825), 2 C. & P. 88. See Bar (Gillespie's transl., 2nd ed.), ss. 264—266, pp. 578—587, for statement of the different views maintained with reference to the laws governing the payment of interest, and note that the Scottish cases cited by Gillespie, pp. 585—587; Maclaren, Court of Session Practice, pp. 306, 307, support Rule 177. For the meaning of the term "proper law of the contract," see Rule 155, p. 572, *ante*. Contrast Minor, s. 179, pp. 432, 433, according to which the question, whether a contract is usurious, depends upon the law of the country where the loan is made, and not upon the law of the country where the money is to be paid.

The law of the contract will indeed in general be the law of the country where the debt is to be paid or loan repaid. "The general rule is, that interest is to be paid on contracts according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid. . . . Thus a note made in Canada, where interest is six per cent., payable with interest in England, where it is five per cent., bears English interest only. Loans made in a place bear the interest of that place, unless they are payable elsewhere. And, if payable in a foreign country, they may bear any rate of interest not exceeding that which is lawful by the laws of that country" (l). But the reason why questions relating to interest are determined in general by the law of the place where the money owing or lent must be paid or repaid is that such law is in general the proper law of the contract. The principle to be kept in mind is, therefore, that interest is determined by the law governing the contract (m).

Illustrations.

1. X borrows money from A in India. The loan is repayable in India. The loan bears Indian interest (n), *i.e.*, whether and what interest is payable is determined, as far as it depends upon law, by the law of India.

2. In 1829 a bill of exchange is drawn and accepted in Paris, but made payable in England. No rate of interest is expressed to be payable on the bill. Default having been made in payment of the bill, the rate of interest payable is to be determined by English law (o).

3. X agrees with A in London to pay A commission for services to be rendered by A in Scotland. A debt of 200*l.* is due under the contract from X to A. Whether the debt carries interest is to be determined by the law of England(?) (p).

(l) Story, s. 291. Compare *Shrichand v. Lacon* (1906), 22 T. L. R. 245.

(m) This is very well put by Nelson, p. 279. As to interest, see *Connor v. Bellamont* (1742), 2 Atk. 382; *Stapleton v. Conway* (1750), 3 Atk. 727; *Bodily v. Bellamy* (1760), 2 Burr. 1094; *Dewar v. Span* (1789), 3 T. R. 425; *Arnott v. Redfern* (1825), 2 C. & P. 88; *Anon.* (1825), 3 Bing. 193; *Thompson v. Powles* (1828), 2 Sim. 194. Compare *Elkins v. East India Co.* (1718), 2 Bro. P. C. 382 (interest on money or property tortiously enjoyed).

(n) Compare *Thompson v. Powles* (1828), 2 Sim. 194, with *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121.

(o) *Cooper v. Earl Waldegrave* (1840), 2 Beav. 282. See Chalmers (8th ed.), p. 279; but compare Rule 172 (2), p. 639, *ante* (Bills of Exchange Act, 1882, s. 72), and Rule 173, p. 644, *ante* (Bills of Exchange Act, 1882, s. 57).

(p) See *Arnott v. Redfern* (1825), 2 C. & P. 88. Compare *Connor v. Bellamont* (1742), 2 Atk. 382.

(I) *CONTRACTS THROUGH AGENTS.**Contract of Agency.*

RULE 179 (*q*).—An agent's authority, as between himself and his principal, is governed by the law with reference to which the agency is constituted, which is in general the law of the country where the relation of principal and agent is created.

Comment.

If *P*, a principal, in Spain, constitutes *A* his agent, Spanish law is "a circumstance to be taken into account in considering the nature and extent of the authority given by [*P* to *A*], but the "Spanish law is not . . . material for any other purpose" (*r*). If a principal, that is to say, in a particular country, there appoints an agent, it is to be presumed that the authority of the agent, as between him and the principal, is governed by the law of such country, *e.g.*, Spain. The contract of agency, in short, is, like other contracts, governed by its proper law, which is in general the law of the place where the contract is made (*lex loci contractus*) (*s*).

Illustration.

P, a Spaniard, living in Spain, there constitutes *A* his agent for the sale of goods, under a document written in Spanish. The authority of *A*, as between *P* and *A*, must be determined in accordance with Spanish law.

Relation of Principal and Third Party.

RULE 180 (*t*).—When a principal in one country contracts in another country through an agent, the rights and liabilities of the principal as regards third parties are, in general, governed by the law of such other country, *i.e.*, the country where the contract is made (*lex loci contractus*).

(*q*) *Maspons v. Mildred* (1882), 9 Q. B. D. (C. A.) 530, 539, judgment of Lindley, L. J. Compare *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79, 83, judgment of Esher, M. R.

(*r*) *Maspons v. Mildred* (1882), 9 Q. B. D. (C. A.) 530, 539, *per Curiam*.

(*s*) See pp. 609—611, *ante*.

(*t*) See *Pattison v. Mills* (1828), 1 Dow & Cl. 342, 363. Compare Scottish case, *Delaurier v. Wyllie* (1889), 17 R. p. 191, for language of Lord Kyllachy.

Comment.

“ If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them ” (*u*).

These words contain a rough statement of the principle which determines the position of a principal in one country who, through an agent, makes contracts in another.

Hence ensues the consequence that if *P* in one country gives *A* a written authority in general terms to act for him as regards certain matters, *e.g.*, the sale and purchase of goods in different countries, *A* may be presumed to have in each country authority to act in accordance with the laws thereof, and in short to do any of the acts which an agent of his class may do under the law of such country.

If, for example, *P* in Brazil gives authority in general terms to *A*, under an instrument written in Portuguese, to act for him in different countries, then “ if we find that the authority might be carried out in England, or in France, or in any other country, we come to the conclusion that it must have been intended that, in any country where in fact it was to be carried out, that part of it which was to be carried out in that country was to be carried out according to the law of that country. That would be putting one construction only on the document [appointing the agent], and not putting a different construction on it in different countries. The one meaning that [the principal] had was: ‘ I give an authority which, if carried out in England, is to be carried out according to the law of England; if in France, according to the law of France.’ That is one meaning, though this authority is to be applied in a different way in different places.

“ If that is so, then the way to express that in the present case is this. This authority was given in Brazil, and the meaning is to be established by ascertaining what [*P*] meant when he wrote it in Brazil. The authority being given in Brazil, and being written in the Portuguese language, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, Brazilian lawyers, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be

(*u*) *Pattison v. Mills* (1828), 1 Dow & Cl. 342, 363, per Lyndhurst, C.

“acted upon in foreign countries, it follows that the extent of the
 “authority, in any country in which the authority is to be acted
 “upon, is to be taken to be according to the law of the particular
 “country where it is acted upon” (*x*).

In other words, *A* may be taken by third parties to have in England the authority which, under English law, belongs to agents of the same class as *A* (*y*).

Under our Rule, the rights and liabilities of a principal in a foreign country who contracts through an agent in England are governed by the law of England, and not by the law of the country (*e.g.*, France) where the principal resides. But our Rule does not in any way preclude the possibility that English law may contain special rules as to the legal position of a foreign principal (*z*). So, again, if an English principal enters into a contract in a foreign country through an agent, his rights and liabilities under the contract are governed by the law of the foreign country, not of England; but it does not follow from this that, under the law of the foreign country (*e.g.*, France) the rights and liabilities of an English principal are the same as those of a French principal.

Illustrations.

1. *P* (principal), a merchant living in England, makes through *A* (agent) in Scotland a contract with *T* (third party) which is

(*x*) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79, 83, 84, judgment of Esher, M. R. Conf. judgment of Lindley, L. J., p. 85. The reasoning of Lord Esher is (it is submitted) not quite satisfactory. If *P*, a Brazilian, appoints *A* to sell goods for *P* in England, and appoints him under a Brazilian document, it is, no doubt, reasonable to suppose that *P* employs *A* to act according to the law of England, *i.e.*, not to do anything forbidden by the law of England, and not to make arrangements which are invalid by the law of England; but can it necessarily be inferred that the extent of *A*'s authority as regards, at any rate, a third person who knows of the existence of the document appointing *A*, is to be measured by the law of England? The assumption is (it is submitted) equally reasonable that *A*'s authority is governed by Brazilian law, under which the appointment was made. Probably all that Lord Esher's language means is that, where the terms of the instrument appointing *A* are general, he must be presumed to have the authority possessed by an agent of *A*'s class under English law.

(*y*) *Chatenay v. Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. (C. A.) 79.

(*z*) See Leake, *Contracts* (6th ed.), pp. 343, 344. See *Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598, 605; and compare the more recent statement of the law as to the liability of a foreign principal, whose identity is not disclosed, in *Müller, Gibb & Co. v. Smith & Tyree, Ltd.*, [1917] 2 K. B. (C. A.) 141. Compare Pollock, *Contract* (8th ed.), p. 104; Anson, *Law of Contracts* (15th ed.), p. 424.

valid according to Scottish, but not according to English law. The contract is governed by Scottish law (*a*).

2. *P* in France, through *A* in England, engages *T* to serve *P* in London as a domestic servant. *P*'s rights and liabilities are governed by English law.

3. *P*, a Spaniard in Spain, through *A*, a Spaniard in England, effects an insurance with *T*, a London underwriter, on *P*'s ship. *P*'s name is not disclosed to *T*. *P*'s rights and liabilities are governed by English law (*b*).

4. *P*, a merchant of New Orleans, orders goods from *A*, a commission agent in England, who procures them from *T*, an English manufacturer. *P*'s rights and liabilities are governed by English law, and not by the law of Louisiana (*c*).

(J) *DAMAGES FOR BREACH OF CONTRACT AS AFFECTED BY RATE OF EXCHANGE.*

RULE 181.—When upon the breach of a contract the person in default becomes liable for the payment of a sum of money in a foreign currency, the damages for the purpose of an English judgment must be assessed at the date of the default, and the sum payable must be converted into English currency at the rate of exchange current at that date.

Comment.

This Rule is an outcome of the conditions prevailing during the war period which have given special importance to the question of the rate of exchange. A judgment in an English Court must be for some sum in English currency, and it is now definitely decided (*d*) that, if upon the breach of a contract either party

(*a*) *Pattison v. Mills* (1828), 1 Dow & Cl. 342.

(*b*) See *Maspons v. Mildred* (1882), 9 Q. B. D. (C. A.) 530, 541; *Maanss v. Henderson* (1801), 1 East, 335.

(*c*) *Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598, 605.

(*d*) *Di Ferdinando v. Simon, Smits & Co.*, [1920] 2 K. B. 704, per Roche, J., affirmed by the Court of Appeal, [1920] 3 K. B. 409; 36 T. L. R. 797; *Barry and others v. Van den Hurk*, [1920] 2 K. B. 709, 712, per Bailhache, J.; *Lebeaupin v. Crispin*, [1920] 2 K. B. 714, 722, per McCardie, J. These cases definitely dispose of the earlier judgment of Roche, J., in *Kirsch v. Allen, Harding & Co.* (1919), 89 L. J. K. B. 265; reversed on facts, [1920] W. N. 73, which was in accord with the view of Story, ss. 308—311 a; *Marburg v. Marburg* (1866), 26 Maryland, 8.

becomes liable to pay a sum in a foreign currency, the rate at which this sum is to be converted into English currency is to be taken as that current at the time of the definite breach of the contract, and not as that current at the time of the judgment. The doctrine is clearly sound in principle, and any other decision would afford temptation to litigants to delay proceedings in the hope of profiting by fluctuations in exchange rates.

The doctrine only expressly applies to damages for breach of contract and tort (*e*), but it seems suitable for adoption in any case of debt, though there is some early authority (*f*) in favour of taking the date of the judgment as the criterion in such cases.

Illustrations.

1. *X & Co.* contract to carry goods for *A* from England to Italy, and to deliver them there on February 10, 1919. They do not carry out their contract, but convert the goods. *A* brings an action against *X & Co.* in England. The damages are to be assessed, and the rate of exchange for their conversion to be fixed, as at February 10, 1919, and not as at the date of judgment (*g*).

2. *X* in England contracts with *A* in New York for the purchase of milk to be delivered free on board ship at New York, payment to be made in dollars. *X* fails to carry out his contract. The sum awarded to *A* as damages in an action in England is calculated at the amount which *X* ought to have paid to *A* in dollars at the time of the breach of contract, converted into English currency at the rate of exchange then prevailing (*h*).

(*e*) In *The Volturno*, [1920] P. 447, Scrutton, J., adopted the rule in contract, and this view was approved by the Court of Appeal and the House of Lords (1921), 37 T. L. R. 969, in which judgment the rule adopted in the case of contract is formally approved.

(*f*) *Scott v. Bevan* (1831), 2 B. & Ad. 78, *diss.* Lord Tenterden, at p. 85. This was a decision on an action brought on a judgment debt in Jamaica, and, if the judgment meant that the exchange was to be fixed as at the date of the judgment in England (as usually understood ([1920] 2 K. B. 724, per McCauley, J.; Westlake, s. 226) and as followed in *Cohn v. Boulken* (1920), 36 T. L. R. 767), there is a clear divergence between this and the cases on breach of contract. So understood, the decision is contrary to Lord Eldon's view in *Cash v. Kennion* (1805), 11 Ves. 314, 316, but if the decision really meant ([1920] 3 K. B. 415, 416; 37 T. L. R. 971) that the date of the Jamaican judgment was the time for fixing the exchange, the case agrees with the later doctrine. In *Manners v. Pearson & Son*, [1898] 1 Ch. (O. A.) 581, it was held that in an action for an account the conversion of foreign currency into English takes place as from the judgment, but this decision may be explained on the ground that there was nothing due until the account was definitely taken; but see judgment of Vaughan Williams, L. J., who dissented, at p. 592.

(*g*) *Di Ferdinando v. Simon, Smits & Co.*, [1920] 2 K. B. 704; 3 K. B. (C. A.) 409.

(*h*) *Barry and others v. Van den Hurk*, [1920] 2 K. B. 709.

CHAPTER XXVII.

MARRIAGE.

(A) *VALIDITY OF MARRIAGE* (a).

RULE 182.—Subject to the exceptions hereinafter mentioned, a marriage is valid when

(1) each (b) of the parties has, according to the law of his or her respective domicile, the capacity (c) to marry the other, *and*,

(2) any one of the following conditions as to the form (d) of celebration is complied with (that is to say):

(i) if the marriage is celebrated in accordance with the local form (e); or,

(a) Savigny, s. 379, p. 290; s. 381, pp. 318—325; Westlake, ss. 17—34; Story, ss. 79—81, 107—124b; Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23). For the meaning of the term “marriage” in this Digest, see Rule 62, pp. 285, 286, and p. 289, *ante*.

(b) This Rule is only affirmative. See Rule 183, Exception 1, p. 683, *post*. Conf. as to capacity to contract, Rule 158, p. 577, *ante*.

(c) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, compared with *Sottomayor v. De Barros* (1879), 5 P. D. 94; *Mrs. Bulkley's Case*, in the French Courts, cited in note to *Pitt v. Pitt* (1864), 4 Macq. 649; *Brook v. Brook* (1861), 9 H. L. O. 193; *In re Bozzelli's Settlement*, *Hussey-Hunt v. Bozzelli*, [1902] 1 Ch. 751.

(d) *Simonin v. Mallao* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54; *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 395; *Herbert v. Herbert* (1819), 2 Hagg. Cons. 263; *Smith v. Maxwell* (1824), Ryan & Moody, 80; *Swift v. Kelly* (1835), 3 Knapp, 257.

(e) For meaning of “local form,” see Rule 159 (1), p. 583, *ante*. The contract of marriage is obviously made in the country where the marriage is celebrated. *Ogden v. Ogden*, [1907] P. 107; [1908] P. (C. A.) 46. Thus a marriage by repute as recognized in Scotland (*Campbell v. Campbell* (1867), 5 M. (H. L.) 115) is celebrated in accordance with the local form. In a British colony marriages celebrated in accordance with the rules of the English common law prior to 26 Geo. 2, c. 23, *i.e.*, by an episcopally ordained clergyman, are *prima facie* valid. *Limerick v. Limerick* (1863), 32 L. J. P. & D. 92. See also *In re Green*, *Noyes v. Pitkin* (1909), 22 T. L. R. 222 (marriage by repute in New York); compare [1911] 2 Ch. 275.

- (ii) if the parties enjoy the privilege of extritoriality, and the marriage is celebrated in accordance with any form recognized as valid by the law of the State (*f*) to which they belong (*g*); or,
- (iii) if the marriage [being between British subjects?] is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible (*h*); or,
- (iv) if the marriage is celebrated in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892, s. 22, within the lines of a British Army serving abroad; or,
- (v) if the marriage, being between parties, one of whom at least is a British subject, is celebrated outside the United Kingdom in accordance with the provisions of, and the form required by, the Foreign Marriage Act, 1892 (*i*), by or before a marriage officer (*k*) (such, for example, as a British ambassador (*l*))

(*f*) As to application of this sub-clause where a State, *e.g.*, the British Empire, consists of several countries, see p. 669, note (*p*), *post*.

(*g*) *Pertreis v. Tondear* (1790), 1 Hagg. Cons. 136; *Lautour v. Teesdale* (1816), 8 Taunt. 830; *Rex v. Brampton* (1808), 10 East, 282. See also Marriage Commission Report, p. 1; *Higgs v. Higgs* (1920), 37 T. L. R. 670.

(*h*) *Ruding v. Smith* (1821), 2 Hagg. Cons. 371; *Cruise on Dignities*, 276; *Waldegrave Peerage Case* (1837), 4 Cl. & F. 649; *Lloyd v. Petitjean* (1839), 2 Curt. 251; *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705; *Armitage v. Armitage* (1866), L. R. 3 Eq. 343; *Lightbody v. West* (1902), 87 L. T. 138; 18 T. L. R. 529; (C. A.) 19 T. L. R. 319.

(*i*) See the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 1; and *Hay v. Northcote*, [1900] 2 Ch. 262.

(*k*) *Ibid.*, ss. 1, 11, 12.

(*l*) *Ibid.*, s. 11, sub-s. (2) (a).

or British consul (*m*)), within the meaning of, and duly authorised to be a marriage officer under, the said Act (*n*).

Comment and Illustrations.

The validity of a marriage under this Rule depends on the fulfilment of two conditions: first, on the *capacity* of the parties to marry each other; secondly, on the celebration of the marriage in due *form*: the word "form" includes all the formalities necessary to the validity of a marriage.

(1) *Capacity*.

The capacity of each of the parties to a marriage is to be judged of by their respective *lex domicilii* (*o*). If they are each, whether belonging to the same country (*p*) or to different countries, capable according to their *lex domicilii* of marriage with the other, they have the capacity required by Rule 182, and their marriage is, as far as capacity is concerned, valid. In short, "as in other contracts, so in that of marriage, personal capacity must depend on "the law of domicile" (*q*).

H and *W* are Portuguese subjects, but domiciled in England. Being first cousins, they are, by the law of Portugal, incapable of contracting a valid marriage with each other. They are duly married in London, according to the forms required by English law. Their marriage is valid (*r*).

In 1871 *W*, an Englishwoman, domiciled in England, marries an Italian subject domiciled in Italy. After the death of her first husband *W*, being still domiciled in Italy, marries, in 1880,

(*m*) See the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), s. 11, sub-s. (2) (b).

(*n*) *Ibid.*, ss. 11, 12. Note particularly that a marriage officer within this sub-clause must be authorized to be a marriage officer either under the warrant of a Secretary of State, termed a marriage warrant (*ibid.*, s. 11, sub-s. (1) (a)), or under marriage regulations issued under the Foreign Marriage Act, 1892. *Ibid.*, s. 11, sub-s. (1) (b), and compare generally all the provisions of ss. 11, 12, 21.

(*o*) See, as to capacity to contract, Rule 158, p. 577, *ante*.

(*p*) For meaning of "country," see pp. 67, 69, *ante*.

(*q*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*.

(*r*) Compare *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, with *Sottomayor v. De Barros* (1879), 5 P. D. 94. See, further, comment on Rule 183, p. 678, *post*.

H, the brother of her deceased husband, also an Italian subject, domiciled in Italy. The required dispensation for the marriage is obtained both from the civil and from the ecclesiastical authorities. The second marriage is celebrated in Milan both civilly, and in church, according to the rites of the Roman Catholic Church. The marriage is valid (*s*).

(2) *Form*.

(i) *Local form (t)*. A marriage celebrated in the mode, or according to the rites or ceremonies, held requisite by the law of the country where the marriage takes place (*u*), is (as far as formal requisites go) valid. Our Courts in this matter give effect to the principle that the form of a contract is governed by the law of the place where the contract takes place, and hold that, though under certain circumstances other forms may be sufficient, yet that the local form always suffices, and that in general "the law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted" (*x*).

In two respects, an extremely wide extension has been given to the principle contained in these words.

In the first place, the consents of and the notices to parents or others, necessary by many laws to the validity of a marriage, are considered as part of the form or ceremony of the marriage (*y*).

(*s*) *I.e.*, in England. See *In re Bozzelli's Settlement*, [1902] 1 Ch. 751, 756. This case gives full effect to the principle that "The capacity of the parties must be determined by the law of their domicile," such marriages then being invalid by English law. See now the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. 5, c. 24).

(*t*) See sub-clause (i), p. 661, *ante*. The Courts will sometimes, when some evidence is given that persons who have lived as reputed husband and wife have gone through some marriage ceremony in a foreign country, presume, on very slight grounds, that the local form of marriage was followed. *In re Shephard*, [1904] 1 Ch. 656.

(*u*) As to formal validity of contract, see Rule 159, p. 583, *ante*.

(*x*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*; *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.

(*y*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 7, *per Curiam*; *Chetti v. Chetti*, [1909] P. 67, 81—87. Compare the Irish case, *Steele v. Braddell* (1838), Milw. 1. This doctrine is now fully established by decided cases, but is logically open to criticism. A person who cannot marry without the consent of another is, *pro tanto*, under an incapacity, and, on the principle that capacity depends on the *lex domicilii*, the want of such consent ought to invalidate a marriage wherever it takes place.

The earlier English decisions did not distinguish between *capacity* and *form*, and brought both one and the other within the principle that the validity of a

In the second place, the validity of a marriage is in no degree affected by the fact that the object of the parties in marrying away from their own country is to evade the requirements of the law of their domicile as to consents, publicity, &c., or that no regular ceremony is required by the law of the country where the marriage takes place (z).

Hence, on the one hand, marriages between domiciled English persons, celebrated in a foreign country, are valid if solemnized according to the forms required by the law of the country (*e.g.*, Scotland or France) where the marriage takes place (a); and on the other hand, the marriage in England of foreigners (*e.g.*, French subjects domiciled in France) is, if duly celebrated according to the forms of English law, held valid here, even though it may be pronounced invalid by a French Court for want of the consents required by French law, or because the parties meant to evade the operation of French law.

contract depends on the *lex loci contractus*. It was, therefore, laid down that the validity of a marriage celebrated in Scotland was to "be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of [a person's] marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of Scotland." (*Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54, 58, 59, per Sir W. Scott.) Hence the validity both of so-called Gretna Green marriages and of marriages in foreign countries, though purposely celebrated out of England to evade the requirements as to consents of the English marriage law, became firmly established by a series of cases, the effect of which could not be reversed except by legislation; *Compton v. Bearcroft* (1769), 2 Hagg. Cons. 430, 443, 444; *Grierson v. Grierson* (1781), 2 Hagg. Cons. 86, 98, 99. See *Commonwealth v. Lane* (1873), 113 Mass. 458 (Am.).

At a later period the Courts distinguished between capacity for marriage and the forms of marriage, holding that questions of capacity depended, in part at least, on the *lex domicilii*. (*Brook v. Brook* (1861), 9 H. L. C. 193.) The decisions with respect to Scottish marriages could not then be reversed; and in order to reconcile them with the new distinction between capacity and form, the Courts were driven to adopt the logically very doubtful theory that the question of consent belongs to the marriage ceremony. See App., Note 5, "Preference of English Courts for *Lex loci contractus*."

(z) *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54; *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 395; *Swift v. Kelly* (1835), 3 Knapp, 257; *Simonin v. Mallao* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97; *Ogden v. Ogden*, [1908] P. (C. A.) 46; *Stathatos v. Stathatos*, [1913] P. 46; *De Montaignu v. De Montaignu*, [1913] P. 154. See remarks of Lord Brougham in *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 548.

(a) *Ibid.* But see, as to the kind of form required, *Burt v. Burt* (1860), 2 Sw. & Tr. 88; *Reg. v. Allen* (1872), L. R. 1 O. C. 367, 376, *per Curiam*.

H, an English infant domiciled in England, wishes to marry *W*, an Englishwoman. To evade the opposition of his guardians *H* goes to Scotland, and resides there for four weeks (*b*). *W* then joins *H* in Scotland, and they are privately married there, *per verba de præsenti*, i.e., by the mere statement in the presence of witnesses that they are man and wife. The marriage is valid (*c*).

H and *W*, British subjects domiciled in England, and both of them infants, are privately married at Madrid by a Roman Catholic priest. The marriage, if valid by Spanish law, is valid here (*d*).

H and *W* are French subjects domiciled in France. *H* cannot obtain his father's consent to the marriage. To avoid the necessity for such consent, *H* and *W* come to England, and are there married by licence in accordance with English law. The marriage is invalid in France for want of the due consents, but is held valid by our Courts (*e*).

With reference to a case such as this, the Court of Appeal thus expressed itself:—

"The objection to the validity of the marriage in that case, which was solemnized in England, was the want of the consent of parents required by the law of France, but not, under the circumstances, by that of this country. In our opinion, this consent must be considered a part of the ceremony of marriage, and not a matter affecting the personal capacity of the parties to contract marriage" (*f*).

(*b*) Residence of one of the parties in Scotland for twenty-one days is now required under the Marriage (Scotland) Act, 1856 (19 & 20 Vict. c. 96), s. 1. *Lawford v. Davies* (1878), 4 P. D. 61; *Miller v. Deakin* (1912), 1 Sc. L. T. 253.

(*c*) *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54. Where an Englishman, *H*, and a British subject lived in Minnesota with a woman, *W*, as her reputed husband, and it was shown that under the law of Minnesota marriage is a contract depending wholly on the consent of the parties, which can be entered into without any formality, and that persons living together in Minnesota as reputed husband and wife are presumed to have entered into a contract of marriage, an English Court has (*semble*) presumed, in the absence of evidence to the contrary, that there was a valid marriage between *H* and *W*. *Newman v. Att.-Gen.*, *Times*, 27 Feb. 1906; *In re Green*, *Noyes v. Pitkin* (1909), 22 T. L. R. 222; see also [1911] 2 Ch. 275.

(*d*) *Swift v. Kelly* (1835), 3 Knapp, 257.

(*e*) *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67; 29 L. J. (P. & M.) 97.

(*f*) *Sottomayor v. De Barros* (1877), 3 P. D. 1, 7, *per Curiam*.

The form need not necessarily be the form required by the *lex loci* in ordinary cases. All that is essential in order to bring a marriage within clause (*i*) is that it should be contracted in a form which, according to the law of the country where the marriage takes place, is sufficient, under the circumstances of the particular case, to constitute a valid marriage. Suppose, for example, that the

(ii) *Exterritoriality (g)*.—The subjects of a State are, under certain circumstances, when in fact not residing within the limits of such State, considered by a fiction of law to be resident there, and to be subject to its laws. This fiction is termed *exterritoriality (h)*.

The effect of exterritoriality as regards marriage (*i*) is, that where it applies a marriage is valid though not celebrated according to the ordinary local forms of the place of celebration, and is treated as though it had been in fact celebrated in the country in which it is supposed by a fiction of law to have been solemnized.

The principle of exterritoriality applies to marriages celebrated in the mansion of an ambassador; to marriages celebrated at foreign factories and certain places, mainly found in the East, in which Europeans enjoy the privileges of exterritoriality; and lastly to marriages celebrated on board ship (*k*).

Marriages at Ambassador's.—The mansion of an ambassador is treated as part of the country which he represents. Hence marriages there by subjects of that country are good if celebrated according to forms held valid by its laws.

H and *W*, British subjects, are married, according to the rites of the Church of England, at the British Embassy at Paris. Their marriage is, independently of Acts of Parliament (*l*), valid in England, and would, it may be added, be held valid elsewhere.

H and *W*, Spanish subjects, are married according to Spanish forms at the Spanish Embassy in London. Their marriage is valid in England and elsewhere.

law of France were that marriages between British subjects might be validly contracted in France if celebrated in accordance with the rites of the Church of England without any further ceremony. Then a marriage at Paris between *H* and *W*, British subjects, celebrated according to the rites of the Church of England, would be valid here, as being celebrated according to the form required by the *Lex loci contractus*. Contrast *Re Alison's Trusts* (1874), 31 L. T. 638, in which neither the local form proper nor the form recognized as applicable to foreigners in Persia was observed.

(*g*) See sub-clause (ii), p. 662, *ante*.

(*h*) See Woolsey, International Law, s. 64.

(*i*) *Pertreis v. Tondear* (1790), 1 Hagg. Cons. 136; *Lautour v. Teesdale* (1816), 8 Taunt. 830; *Rex v. Brampton* (1808), 10 East, 282; *Higgs v. Higgs* (1920), 36 T. L. R. 690 (marriage at the British Factory in St. Petersburg valid under 4 Geo. 4, c. 67, repealed from 1891 by 53 & 54 Vict. c. 47, s. 12).

(*k*) The application of the principle in the last case is somewhat different from its application in the first two cases.

(*l*) See Rule 182, sub-clause (ii), p. 662, *ante*. Whether such a marriage is now valid if it does not conform to the provisions of the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23)? *Semble*, it is valid. See *ibid.*, s. 23.

This privilege of extritoriality probably extends only to cases where *both parties* are subjects of the ambassador's sovereign. It certainly does not extend to cases where neither of the parties are his subjects.

The marriage between *H*, a foreigner, in the suite of the Spanish ambassador, and *W*, who was not a Bavarian subject, was celebrated at the chapel of the Bavarian ambassador in London. It was held invalid on the following grounds:—

“The party who proceeds was in the suite of the Spanish ambassador, and not of the Bavarian; and the other party, though she has the name of a foreigner, is not described as being of any ambassador's family, and has been resident in this country four months, which is much more than is necessary to constitute a matrimonial domicile in England, inasmuch as one month is sufficient for that under the Act of Parliament. Supposing the case, therefore, to be assimilated to that of a marriage abroad between persons of a different country, it is difficult to bring this marriage within the exception, as this woman is not described as domiciled in the family of the ambassador. Taking the privilege to exist in ambassadors' chapels (which has, perhaps, not been formally decided), I may still deem it a fit subject of consideration whether such a privilege can protect a marriage where neither party, as far as appears at present, is of the country of the ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shown that she had been living in a house entitled to privilege during her residence in England. On these grounds I shall admit the libel. The matter may receive further illustration of facts which may entitle it to further consideration” (*m*).

Marriage at foreign factories.—It was at one time common in all lands, and is still common in the East, for the government of the country to allow to foreigners, at any rate within the limits of factories or trade settlements, the use of their own laws. In this case the factory is regarded as part of the country to which it belongs, and persons marrying there may make a valid marriage by celebrating it according to the law of that country.

“In foreign countries where, either by express treaty or by the

(*m*) *Pertreus v. Tondear* (1790), 1 Hagg. Cons. 136, 138, 139, *per Curiam*. It may be assumed, though the point cannot be treated as judicially decided, that the privilege of extritoriality does not in England extend to any British subject. Mar. Comm. Rep., 1868, p. xxxviii. See, however, *Macartney v. Garbutt* (1890), 24 Q. B. D. 368: p. 219, note (*c*).

"comity of nations, the privilege of extritoriality has been enjoyed by British subjects within any defined limits, such as the factory of a trading company or the hotel of an ambassador, the marriage of a British subject, solemnised within such limits, according to the law of England, as it existed antecedent to the passing (*n*) of Lord Hardwicke's Act, has always been upheld by English Courts as a valid marriage" (*o*). The rule applied to the marriages of British subjects no doubt also applies to those of foreigners. *H* and *W*, for example, French subjects, marry at a French factory in Turkey, according to French forms. Their marriage will be held valid by English Courts.

Marriages on shipboard.—Any ship on the high seas, and a ship of war even when in a foreign port, is deemed part of the country to which the ship belongs. Marriages, therefore, on shipboard are in general valid, if good by the law of such country (*p*).

(*n*) *I.e.*, marriage before an episcopally ordained clergyman, *e.g.*, a clergyman of the Church of England, a Roman Catholic priest, or a priest of the Greek Church. *Reg. v. Millis* (1844), 10 Cl. & F. 534.

(*o*) Mar. Comm. Rep., 1868, p. 1. See Foreign Marriage Act, 1892, s. 23.

(*p*) The application of the principle of extritoriality to the marriages of British subjects presents some difficulty, owing to the fact that they are citizens of a State which consists of different countries (see pp. 67, 69, *ante*). Hence the inquiry may be raised, what is the law by which a British subject, for instance, on board a British merchant ship on the high seas, is governed, and by which the validity of his marriage on shipboard is to be determined? Is it the common law of England, or the statute law and common law combined, or the law of the country (*e.g.*, Scotland) where he is domiciled, or where the ship is registered?

The answer to these and other questions of a like sort appears to be that, in the cases to which the principle of extritoriality applies, a British subject must be taken to be under the rule of the law of England, including the statute law, in so far as that law is not by express words or necessary intendment confined in its operation to British territory. As to the application of statute law to British ships, compare *Schwarz v. India Rubber, &c. Co.*, [1912] 2 K. B. (C. A.) 299. Cf. Macdonald, *Criminal Law of Scotland*, p. 249.

The correctness of this view, though open to question, appears to be confirmed by the principle that British subjects settling in a newly-discovered country carry the law of England with them (1 Blackstone, pp. 107, 108); by the rules as to Anglo-Indian domicile (Conflict (2nd ed.), pp. 156—158); and by the language of the Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 3. Compare the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), ss. 4, 14, 15. Cf. *In re Johnson*, [1903] 1 Ch. 821, 832—835.

The questions which may be raised as to the law which governs British subjects when on board a British ship may, of course, also be raised as to the law which governs them when they are within the limits of a British Embassy, or of a country where British subjects can claim the privilege of extritoriality; but marriages of British subjects in foreign countries are now to such a great

H and *W*, British subjects, marry on board a British merchant vessel on the high seas. The marriage service is performed by a Roman Catholic priest. The marriage, being good at common law, is valid (*q*).

extent regulated by the Foreign Marriage Act, 1892, that questions as to the validity of such marriages, independently of this Act, are unlikely to arise.

H and *W*, Scottish persons domiciled in Scotland, contract marriage on board a British merchant ship on the high seas, *per verba de presenti*. No minister is present at the time of the making of the contract. The marriage is probably invalid. But it is possible that in such a case the validity of the marriage depends on the law of the country (*viz.*, Scotland) where the parties are domiciled. Yet this does not meet the difficulty which may be raised where the respective domicils of the parties are different.

It is also possible that the law applicable should be the law of that portion of the United Kingdom in which the ship is registered, and that a marriage is valid if celebrated on a British ship, registered at a Scottish port, on the high seas, whatever the domicile of the parties. In such a case it might be held that the requirements of the Marriage (Scotland) Act, 1856 (19 & 20 Vict. c. 96), as to the prior residence of one of the parties in Scotland would not be applicable. Whatever view the Scottish Courts might take of such a case (compare *Aberdeen Arctic Co. v. Sutter* (1862), 6 L. T. 229, 233, *per* Lord Chelmsford), there seems no sufficient reason why English Courts should depart from the principle that the law applicable to a British ship outside territorial waters is English law. This is clearly the case as regards British ships registered in any British possession, save in so far as the Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vict. c. 12), s. 5, provides that the laws of the Commonwealth shall be in force on all British ships (other than men-of-war) whose first port of clearance and whose port of destination are in the Commonwealth.

The difficulties which exist in applying the principle of extritoriality to the marriages of British subjects may exist in applying it to the marriages of persons belonging to other States, such as the United States of America, consisting of different countries with different marriage laws.

(*q*) *Reg. v. Millis* (1844), 10 Cl. & F. 531. Compare *Catherwood v. Caslon* (1844), 13 M. & W. 261. The validity of such a marriage is not (*semble*) in any way affected by the Foreign Marriage Act, 1892. The authority of *Reg. v. Millis* is, to a certain extent, doubtful. In *Beamish v. Beamish* (1861), 9 H. L. C. 274, *Reg. v. Millis* was followed, and the fact that the bridegroom himself was a clergyman in holy orders, there being no other clergyman present, was held not to make the marriage valid. It was also followed by the Irish Court of Queen's Bench regarding the marriage of a soldier on a transport in 1817. *Du Moulin v. Druitt* (1860), 13 Ir. C. L. R. 212; 6 Ir. Jur. (N. S.) 76. It has not been followed in the Canadian Courts (*Breakey v. Breakey*, 2 U. C. Q. B. 349), and it has been severely criticised in the Ecclesiastical Courts; *Catterall v. Catterall* (1847), 1 Rob. Ecc. 580. Conf. *Culling v. Culling*, [1896] P. 116; and 2 Pollock & Maitland, *Hist. of Eng. Law*, pp. 370—372.

It has not been followed in the United States. See, especially, Wharton (3rd ed.), s. 172, p. 372, note 2, where *Reg. v. Millis* is fully discussed and entirely disapproved of. It is, however, clearly binding on English Courts. It is not, however, binding on Colonial Courts, the appeal from which is to the Privy Council, not to the House of Lords.

(iii) *Use of the local form impossible* (r).—Sub-clause (iii) applies to marriages in countries where it is strictly impossible for the parties to use a local form.

The impossibility may arise from the country being one where no local form of marriage recognized by civilized States exists, as where the marriage takes place in a land inhabited by savages, or it may arise from the form being one which it is morally or legally impossible for the parties to use. On this ground, a marriage between Protestants, celebrated at Rome by a Protestant clergyman, was admitted to be valid by Lord Eldon, on its being sworn that two Protestants could not there be married in accordance with the *lex loci*, as no Roman Catholic priest would be allowed to marry them (s). On the same ground, marriages in heathen or Mahommedan (t) countries would be held valid, even though not in accordance with the local form. The validity, again, of marriages celebrated abroad, in accordance with the English common law, within the lines of a British army, may possibly (independently of statutory enactments) (u) be placed on the ground of the impossibility of complying with the local form.

That sub-clause (iii) may apply there must be an impossibility amounting to an insuperable difficulty (x) in complying with the local form. "Where persons [are] married abroad, it [is] necessary "to show that they were married according to the *lex loci*, or that "they could not avail themselves of the *lex loci*, or that there was "no *lex loci*" (y). Mere difficulty in fulfilling the conditions imposed by the local law is not enough. Thus the fact that the law of a country does not allow persons to intermarry who have not resided there for six months does not enable British subjects who have resided there for a shorter period to make a valid marriage without complying with the requirements of the local law (z).

The cases as to marriages held valid on account of the impossibility of complying with the local form are not numerous, and refer to the marriages of British subjects. It may, however, be

(r) See sub-clause (iii), p. 662, *ante*; *Lightbody v. West* (1902), 87 L. T. 138.

(s) Cruise on Dignities, p. 276; Westlake (5th ed.), s. 26.

The Roman law was, as Westlake points out, incorrectly stated.

(t) Supposing, of course, that the local marriage form involved ceremonies in which Christians could not take part.

(u) See, however, the Foreign Marriage Act, 1892, s. 22.

(x) *Kent v. Burgess* (1840), 11 Sim. 361, 376.

(y) Per Eldon, C.; Cruise on Dignities, p. 276.

(z) *Kent v. Burgess* (1840), 11 Sim. 361.

assumed that, when compliance with the local form is impossible, our Courts will hold the marriages of foreigners valid, at any rate if held good by the law of the country where the foreigners are domiciled. If, for example, *H* and *W*, Italian subjects domiciled in Italy, intermarry in China in accordance with a form held under the circumstances valid by the Italian tribunals, our Courts will probably hold the marriage good (*a*).

Sub-clause (iii) applies, from its nature, only to marriages taking place beyond the limits of the British dominions (*b*).

(iv) *Marriage within the lines of a British army (c)*.—"It is hereby declared that all marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnized within the United Kingdom, with a due observance of all forms required by law" (*d*).

This enactment, which in substance re-enacts part of 4 Geo. IV. c. 91, s. 1, applies apparently not only to marriages where one of the parties is a British subject, but also to marriages between aliens. The marriage is valid whether the British army be or be not in hostile occupation of a foreign country (*e*), and whether the chaplain, officer, or other person celebrating the marriage is authorized by the commanding officer to celebrate the particular marriage or not (*e*). No special form appears to be necessary.

(v) *Marriages (f) under the Foreign Marriage Act, 1892 (g)*.—"All marriages between parties of whom one, at least, is a British subject, solemnized in the manner in this Act [Foreign Marriage Act, 1892] provided, in any foreign country or place, by or before a marriage officer within the meaning of this Act, shall be as valid in law as if the same had been solemnized in

(a) See 2 Fraser, Husband and Wife (2nd ed.), pp. 1313, 1314.

(b) A marriage could never be valid under sub-clause (iii) if it came within sub-clause (v), i.e., could be celebrated under the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23).

(c) See sub-clause (iv), p. 662, *ante*.

(d) Foreign Marriage Act, 1892, s. 22. See *King v. Brampton* (1808), 10 East, 282; *Waldegrave Peerage Case* (1837), 4 Cl. & F. 649; and compare 4 Geo. IV. c. 91, which is now repealed.

(e) *Waldegrave Peerage Case* (1837), 4 Cl. & F. 649.

(f) I.e., other than a marriage within the lines of a British army.

(g) 55 & 56 Vict. c. 23. See Foreign Marriages Order in Council, Oct. 28, 1892; London Gazette, Friday, Nov. 4, 1892.

“the United Kingdom with a due observance of all forms required “by law” (*h*).

These words give the effect of the Foreign Marriage Act, 1892. It provides modes in which (independently of the local form) a British subject may contract a valid marriage in a country outside the United Kingdom. The marriages to which it applies come in substance under four heads:—

(a) A marriage solemnized by or before a British ambassador(*i*) residing in a foreign country to the government of which he is accredited at his official residence.

(b) A marriage solemnized by or before a British consul at his official residence (*k*).

(c) A marriage solemnized on board one of His Majesty's ships on a foreign station by or before the commanding officer thereof(*l*).

(d) A marriage solemnized by or before a Governor, High Commissioner, Resident, consular, or other officer, at his official residence (*m*).

The marriages under heads (a), (b), and (c)(*n*) must, apparently, be solemnized outside the British dominions. A marriage under head (d) (*e.g.*, by a Governor) may be solemnized at a place within the British dominions (*o*).

For all details, the reader should consult the Foreign Marriage Act, 1892, but the following general points deserve notice:—

First. A marriage duly solemnized under the Foreign Marriage Act, 1892, is valid as regards form even though the local form be not observed (*p*).

(*h*) Foreign Marriage Act, 1892, s. 1; *Hay v. Northcote*, [1900] 2 Ch. 262; and see p. 674, *post*.

(*i*) Or any officer prescribed as an officer for solemnizing marriage in the official house of such ambassador. Compare Foreign Marriage Act, 1892, ss. 1, 8, 11, sub-ss. (1) (a) and (b), and (2) (a).

(*k*) Foreign Marriage Act, 1892, ss. 1, 8, 11, sub-s. 2 (b).

(*l*) *Ibid.*, s. 12.

(*m*) *Ibid.*, ss. 1, 8, 11, sub-s. 2 (c).

(*n*) One of His Majesty's ships is indeed technically treated as part of the British dominions (see pp. 68, 72, *ante*), but the Foreign Marriage Act, 1892, s. 12, applies to such a ship only when “on a foreign station.”

(*o*) Foreign Marriage Act, 1892, s. 11, sub-s. 2 (c).

(*p*) Even though the marriage be held invalid in, and declared invalid by, the Courts of the country (*e.g.*, France) in which it is celebrated, and be held invalid because it was not celebrated in accordance with the formalities required by French law. *Hay v. Northcote*, [1900] 2 Ch. 262. See, however, Foreign Marriage Order in Council, 28th Oct., 1892; London Gazette, Fr., Nov. 4, 1892, especially clauses 4, 5. As to the form to be adopted, see Foreign Marriage Act, 1892, s. 8.

Secondly. The Foreign Marriage Act, 1892, has no bearing upon the capacity of the parties to intermarry. A marriage solemnized under that Act (*e.g.*, at a British consul's) is "as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all forms required by law" (*q*), but a marriage so solemnized in the United Kingdom may be invalid if the parties are incapable of intermarriage under the law of their domicile (*r*). Hence a marriage (*e.g.*, before a British consul) would also be invalid if the parties were under an incapacity to intermarry by the law of their domicile.

Thirdly. A marriage under the Foreign Marriage Act, 1892, is subject to the provisions of the Act as to the authority of the marriage officer by or before whom the marriage is celebrated, as to the due observance of the required formalities, and the like (*s*). And generally the right to solemnize, and the solemnization of any marriage within the Act, is subject to "marriage regulations," to be made by order in council (*t*).

Upon these regulations, which may be made either generally or with reference to any particular case, or class of cases (*u*), depends to a great extent the operation of the Act.

Fourthly. It is an aim of the Act to prevent conflicts of law.

Marriage regulations may prohibit or restrict the exercise by marriage officers of their powers under the Act "where the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations" (*x*).

"A marriage officer [it is further provided] shall not be required to solemnize a marriage, or to allow a marriage to be solemnized in his presence, if in his opinion the solemnization thereof would be inconsistent with international law or the comity of nations" (*y*).

Against such a refusal there is an appeal to a Secretary of State (*y*).

Section 19 of the Foreign Marriage Act, 1892, would, it may be

(*q*) Foreign Marriage Act, 1892, s. 1.

(*r*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. See Rule 182, p. 661, *ante*, and Rule 183, p. 678, *post*. Note that the consents necessary are to be those of English law (see p. 669, *ante*); Foreign Marriage Act, 1892, s. 4, sub-s. 1.

(*s*) Foreign Marriage Act, 1892, ss. 12—16.

(*t*) *Ibid.*, s. 21, and see Order in Council, 28th Oct., 1892.

(*u*) *Ibid.*, s. 21, sub-s. 2.

(*x*) *Ibid.*, s. 21, sub-s. 1 (a), and see Order in Council, 28th Oct., 1892.

(*y*) *Ibid.*, s. 19.

conjectured, hinder the marriage under the Act (*e.g.*, in Portugal) of persons, such as first cousins, held by Portuguese law to be incapable of intermarriage.

Fifthly. "Nothing in this Act," it is provided, "shall confirm "or impair or in anywise affect the validity in law of any "marriage solemnized beyond the seas, otherwise than as herein "provided, and this Act shall not extend to the marriage of any "of the Royal family" (z).

Under this section any marriage (it is submitted), whether celebrated before or after the 1st January, 1893 (*a*), which would have been legally valid if the Act had not passed, still remains valid. Hence, not only is any marriage valid which is celebrated according to the local form, but also, it would seem, any marriage which is valid at common law under the principle of extritoriality. Thus, if *H* and *W* are married by a priest in holy orders on board a British merchant vessel on the high seas in accordance with the rites of the Church of England, their marriage is apparently valid, and is also (it is submitted) valid when so solemnized on board a British man-of-war, even though the provisions of the Foreign Marriage Act, 1892, be not observed (*b*).

Sixthly. The provisions of the Foreign Marriage Act, 1892, lessen the importance of the other forms in which a marriage may be duly celebrated, enumerated in sub-clauses (i), (ii), and (iii) of Rule 182.

Exception 1 (c).—A marriage is not valid if either of the parties, being a descendant of George II., marries

(z) *Ibid.*, s. 23.

(a) The date when the Act came into operation.

(b) It is a possible interpretation of this Act that it makes invalid marriages which ought to be celebrated in accordance with its provisions and are not so celebrated; but this construction of the Act is not required by its general scope, and is hardly consistent with sect. 23. See *Culling v. Culling*, [1896] P. 116.

(c) "There is no necessity to make an exception, as is sometimes done, for "marriages regarded as incestuous by the general consent of Christendom, "because no country with which the communion of private international law "exists has such marriages." Westlake, s. 21.

This observation is sound and has led to the omission of the exception referred to which, taken from Story, ss. 113 a, 114, appeared in the first edition of this work.

It is worth while noting that the motive or ground for prohibiting a marriage may be a guide in deciding what are the marriages and who are the persons intended by the legislature to be affected by the prohibition. Thus, if an Act of Parliament were to prohibit the marriage of first cousins, the Courts would

in contravention of the Royal Marriage Act (12 Geo. III. c. 11).

Comment.

The Royal Marriage Act enacts in substance that, subject to certain exceptions (*d*) and limitations, no descendant of George II. shall be capable of contracting matrimony without the previous consent of the sovereign signified in the manner provided by the Act, and that any marriage of such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever.

H, a descendant of George II., married *W* at Rome, in accordance with the form required by the *lex loci*, without having obtained the consent required by the Act. He was, however, under no disability, either by English or by Roman law, except that which might arise from the contravention of the Royal Marriage Act. His marriage was held by our Courts to be absolutely void (*e*).

The Act, and the case decided under it, give rise to two remarks:—

First. Though *H* was in fact domiciled in England and a British subject, his marriage would, in all probability, have been held invalid had he been domiciled at Rome, and probably even had he been an alien. The Act appears intended to apply to all

probably hold that the ground of such a prohibition was not the immorality but the inexpediency of such a marriage, and would therefore draw the inference that the Act had no application to foreigners domiciled out of England. On the other hand, the suggestion has been made that the marriage between an uncle and his niece is prohibited as immoral, and therefore would, under no circumstances whatever, be recognized by our Courts. *Warrender v. Warrender* (1835), 2 Cl. & F. 531. The doubts, again, which formerly existed as to the limits within which English law refused recognition to the marriage of a widow with her deceased husband's brother depended at bottom on the different views which may be entertained as to the real ground or motive for the prohibition of such a marriage. Note that marriage with a deceased husband's brother is valid in New Zealand, under the Deceased Husband's Brother Marriage Act, 1900, No. 72, which has received the assent of the Crown, and has been held valid by English Courts in the case of Italian subjects domiciled in Italy, where such a marriage is legal (*In re Bozzelli's Settlement*, [1902] 1 Ch. 751), and such marriages are now valid in the United Kingdom under the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. 5, c. 24).

(*d*) See especially, s. 2, as to marriage of descendant of George II., when above twenty-five years of age.

(*e*) *Sussex Peerage Case* (1844), 11 Cl. & F. 85.

the descendants (with a limited exception) (*f*) of George II.: and, if this be the intention of the legislature, all Courts throughout the British dominions must, of course, give effect to it, whatever be the domicile or the allegiance of the persons affected by the Act.

Secondly. It is probable that foreign Courts would not give effect to the provisions of the Royal Marriage Act in the case of persons not domiciled in England, and that our Courts, on the other hand, would refuse to give effect to a similar law passed (*e.g.*, by the Italian Parliament) in the case of a person not domiciled in Italy. The incapacity, in short, produced by such a law would be regarded as constituting a privative status, which was not entitled to recognition by the Courts of any State except the State where the law was in force (*g*).

Exception 2.—A marriage is, possibly, not valid if *either* of the parties is, according to the law of the country where the marriage is *celebrated*, under an incapacity to marry the other (*h*).

Illustrations.

1. *H* and *W* are British subjects. They are both domiciled in Canada. *W* is the niece of *H*'s deceased wife. *H* marries *W* in a church in London in accordance with all the formalities

(*f*) *Viz.*, the issue of princesses marrying into foreign families. It is from this exception that the inference may be drawn that the Act applies to descendants of George II., who may not be British subjects.

(*g*) See Rule 136, p. 500, *ante*.

(*h*) "It is . . . indispensable to the validity of a marriage that the *lex loci actus* be satisfied so far as regards the capacity of the parties to contract it, "whether in respect of the prohibited degrees of affinity, or in respect of any "other cause of incapacity, absolute or relative." Westlake, s. 19, citing *Scrimshire v. Scrimshire* (1752), 2 Hagg. Cons. 395; *Middleton v. Janzerin* (1802), 2 Hagg. Cons. 437; *Dalrymple v. Dalrymple* (1811), 2 Hagg. Cons. 54. The weight due to Mr. Westlake's high authority necessitates the insertion of this Exception. Its soundness, however, is doubtful. The cases he cites are consistent with his doctrine, but do not necessitate its adoption. See *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67. Compare the Scottish case, *Beattie v. Beattie* (1866), 5 M. 181, as to the marriage in Lower Canada of persons who had committed adultery in Scotland, which was held to be invalid under both the law of Lower Canada and Scotland. In *Re Alison's Trusts* (1874), 31 L. T. 638, 640, it was held in the case of a marriage in Persia that the incapacity of the wife, an Armenian Protestant, to contract marriage under the law of her church invalidated the marriage, but the marriage was also clearly invalid as the form of celebration was not in accordance with the *lex loci*.

required by English law. According to the law of Canada the marriage, if celebrated in the Dominion, would be legal (*i*). The marriage between *H* and *W* is possibly not valid (*k*).

2. *H* and *W*, his first cousin, are British subjects domiciled in England. While travelling in Portugal, where first cousins are legally incapable of marrying one another (*l*), they are married in a Portuguese Church, in accordance with the formalities required by Portuguese law. The marriage is (possibly) not valid.

3. The circumstances are the same as in Illustration 2, except that *H* and *W* are married, not in a Portuguese Church, but at an English consulate in Lisbon, in accordance with the provisions of the Foreign Marriage Act, 1892. The marriage is (possibly) not valid (?).

4. *H* and *W*, British subjects domiciled in England, are first cousins; they are married at the British Embassy in Portugal, in accordance with the requirements of the Foreign Marriage Act, 1892. Their marriage is valid (*m*).

RULE 183.—Subject to the exceptions hereinafter mentioned, no marriage is valid which does not comply, as to *both* (1) the capacity (*n*) of the parties, *and* (2) the form (*o*) of the marriage, with Rule 182.

Comment and Illustrations.

(1) *Want of Capacity.*

Capacity to marry (*p*) depends upon the law of a person's domicil.

"It is a well-recognized principle of law that the question of "personal capacity to enter into any contract is to be decided by

(*i*) Revised Statutes, 1906, chap. 105, s. 2.

(*k*) *I.e.*, in England.

(*l*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1.

(*m*) *I.e.*, in England. Compare *Sottomayor v. De Barros* (1879), 5 P. D. 94; *De Wilton v. Montefiore*, [1900] 2 Ch. 481.

Exception 3 has, it is submitted, no application to a case where the parties to a marriage can claim the benefit of extritoriality.

(*n*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5; *Brook v. Brook* (1861), 9 H. L. C. 193, 234, 235.

(*o*) *Kent v. Burgess* (1840), 11 Sim. 361; *In re Estate of MoLoughlin* (1878), 1 L. R. Ir. (Ch.) 421; *Lacon v. Higgins* (1822), 3 Stark. 178; *Butler v. Freeman* (1756), Amb. 301; *Swift v. Kelly* (1835), 3 Knapp, 257; Westlake, s. 17; Story, s. 113.

(*p*) See p. 578, *ante*.

“the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicil; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both, at the time of their marriage, subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized” (q).

“The learned judge (r), [said Lord St. Leonards] . . . came to the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it” (s).

The principle that legal capacity to marry depends upon a person's *lex domicilii* may be applied by our Courts either to marriages prohibited by English law and celebrated in a foreign country, or to marriages prohibited by a foreign law and celebrated in England.

Marriages prohibited by English law.—A marriage of a man with his deceased wife's niece, or with his own niece, when he is domiciled in England, is under this principle invalid wherever celebrated, though lawful in the country where it is celebrated and

(q) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*. For criticism upon, which approaches to dissent from, the principle here laid down, see language of judgment in *Ogden v. Ogden*, [1908] P. (C. A.) 46, 73—76. The case itself, of course, decides nothing which is not consistent with the judgment in *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1. See App., Note 23, “Case of *Ogden v. Ogden*.”

(r) Sir Cresswell Cresswell.

(s) *Brook v. Brook* (1861), 9 H. L. C. 193, 234, 235, *per Lord St. Leonards*.

the niece is domiciled (*t*). The grounds of such invalidity have been thus stated:—

“It is quite obvious that no civilised State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion or morality, or to any of its fundamental institutions.

“A marriage between a man and the [niece] (*u*) of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native-born English subjects, who had abandoned their English domicile, and were domiciled in Denmark. But I am by no means prepared to say that the marriage now in question ought to be, or would be, held valid in the Danish Courts, proof being given that the parties were British subjects domiciled in England at the time of the marriage, that England was to be their matrimonial residence, and that by the law of England such a marriage is prohibited as being contrary to the law of God. The doctrine being established that the incidents of the contract of marriage celebrated in a foreign country are to be determined according to the law of the country in which the parties are domiciled and mean to reside, the consequence seems to follow that by this law must its validity or invalidity be determined” (*x*).

The principle that capacity to marry depends on the law of a person's domicile, has been applied by our Courts mainly to marriages with a deceased wife's sister which were invalid till the passing of the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47), but will clearly be applied by them to any other marriage by a person domiciled in England which comes within the prohibited degrees (*y*) such as a marriage by a man with his brother's daughter or his deceased wife's daughter (*z*).

(*t*) See *De Wilton v. Montefiore*, [1900] 2 Ch. 481; *Brook v. Brook* (1861), 9 H. L. C. 193.

(*u*) The case from which this citation is made, and most of the others cited, have reference to marriage with a deceased wife's sister, which is now valid under English law. But they clearly apply to marriage between a domiciled Englishman and his deceased wife's, or his own niece. Marriage with a deceased wife's niece is permissible under the law of Canada.

(*x*) *Brook v. Brook* (1861), 9 H. L. C. 193, 212, 213, *per Campbell, C.*

(*y*) *De Wilton v. Montefiore*, [1900] 2 Ch. 481.

(*z*) English Courts will, of course, hold invalid a marriage by any person who

H domiciled in England, but resident in Canada, marries there *W*, the niece of his deceased wife. Such marriage is lawful in Canada. The marriage is invalid in England (*a*).

H domiciled and resident in Canada, marries there *W*, the niece of his deceased wife. She is at the moment of the marriage domiciled in England. The marriage (*semble*) is invalid in England (*b*).

Marriages prohibited by foreign law.—A marriage prohibited by the law of the country where both the parties are domiciled, and

is prohibited from entering into it by English law. There is, further, no doubt that marriage between an uncle and his niece is prohibited by English law. The question, however, who are the persons to whom this prohibition is intended to apply admits of controversy, and in fact three different views may be taken as to the answer to be given to it.

First. The prohibition it may be thought applies to all persons whomsoever, whether British subjects or aliens. This is the natural view of those who hold that English law treats the marriage in question as strictly incestuous (*Brook v. Brook* (1861), 9 H. L. C. 193, 230, 234, language of Lord St. Leonards), but is hardly consistent with *In re Bozzelli's Settlement*, [1902] 1 Ch. 751.

Secondly. The prohibition may possibly be held to apply to all British subjects and to all persons domiciled in England. See *Mette v. Mette* (1859), 1 Sw. & Tr. 416; 28 L. J. (P. & M.) 117.

Thirdly. The prohibition may be considered to apply to all persons, whether British subjects or aliens, domiciled in England, and to such persons only. This seems to have been the view of the House of Lords when giving judgment in *Brook v. Brook* (1861), 9 H. L. C. 193 (see especially, language of Campbell, C., pp. 212, 213, and of Lord Cranworth, pp. 226—228). It is clearly now the view entertained both by the Courts (*De Wilton v. Montefiore*, [1900] 2 Ch. 481; *In re Bozzelli's Settlement*, [1900] 1 Ch. 751; *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1), and by Parliament (see the Deceased Wife's Sister's Marriage Act, 1907 (7 Edw. VII. c. 47); the Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. 5, c. 24); the New Zealand Deceased Husband's Brother's Act, 1900, No. 72).

Every Colonial Act receives, it must be remembered, directly or indirectly, the assent of the Crown, *i.e.*, in effect of the British Government, and that the veto of the Crown, *i.e.*, of the British Government, is, though rarely exercised in the case of Colonial legislation, a reality. It is therefore fair to argue that no marriage sanctioned by a Colonial Act is deemed incestuous by the British Government, or by the Parliament of the United Kingdom, as representing the people thereof. As to the veto of Colonial laws, see Dicey, *Law of the Constitution*, chap. ii. As to the retrospective effect of the Deceased Wife's Sister's Marriage Act, 1907, see *In re Green, Green v. Meinall*, [1911] 2 Ch. 275. It does not validate marriage with the daughter of a deceased wife's brother. *In re Phillips* (1918), 35 T. L. R. 98.

(*a*) Compare *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; (1879), 5 P. D. 94. But see Exception 1, p. 683, *post*.

(*b*) *Ibid*.

celebrated here, is, though legal by the ordinary rules of English law, invalid in England.

H and *W*, Portuguese subjects domiciled in Portugal, were first cousins, and on that account incapable by the law of Portugal of intermarrying with each other without the dispensation of the Pope. While residing in England, but not domiciled there, they were married according to the forms required by English law. The marriage was held invalid by our Courts (*c*).

(2) *Want of Form.*

No marriage is valid which, in respect of form, in the very wide sense given to the term "form" by English law (*d*), does not fall within the terms of Rule 182 (*e*).

The following are examples of marriages which are invalid on account of not fulfilling the conditions as to form of Rule 182:—

In 1838 (*f*), *H* and *W*, English persons domiciled in England, are married at the English Church at Antwerp by a clergyman of the Church of England, in the presence of the English Consul. Formalities required in respect of residence and otherwise by Belgian law are omitted. The marriage is invalid (*g*).

In 1833, *H* and *W*, Irish persons domiciled in Ireland, go in England through a ceremony of marriage celebrated by a Roman Catholic priest. The marriage is invalid (*h*).

H and *W*, persons domiciled in Scotland, marry in England by acknowledging themselves to be man and wife in the presence of third parties. The marriage is invalid (*i*).

H, a Frenchman, marries *W*, an Englishwoman and British

(*c*) Though in the judgment of the Court stress is laid on the marriage being by Portuguese law "incestuous," and on the fact that the parties were Portuguese "subjects," these matters are almost certainly immaterial. The true *ratio decidendi* is, that "the question of personal capacity to enter into any "contract is to be decided by the law of domicile." (*Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 5, *per Curiam*.)

(*d*) See pp. 664—666, *ante*.

(*e*) See pp. 661, 662, *ante*.

(*f*) And therefore prior to the Foreign Marriage Act, 1849 (12 & 13 Vict. c. 68).

(*g*) *Kent v. Burgess* (1840), 11 Sim. 361. Compare *Catherwood v. Caslon* (1844), 13 M. & W. 261; 13 L. J. Ex. 334.

(*h*) *In re Estate of McLoughlin* (1878), 1 L. R. Ir. (Ch.) 421. In each of the foregoing cases the marriage, but for its not conforming to the *lex loci contractus*, would be valid by the English common law.

(*i*) It would be held invalid in Scotland as well as in England. 2 Fraser, Husband and Wife (2nd ed.), pp. 1309, 1310.

subject, at the chapel of the French Embassy, without complying with the requirements of English law as to banns, licence, &c. The marriage is invalid (*k*).

Exception 1.—The validity of a marriage celebrated in England between persons of whom the one has an English, and the other a foreign, domicile is not affected by any incapacity which, though existing under the law of such foreign domicile, does not exist under the law of England (*l*).

Comment.

From the principle that capacity depends on the law of a person's domicile, it would seem to follow that the disability of either party (*m*), under the law of his or her domicile, to contract a marriage with the other, invalidates the marriage. In the case, however, establishing this doctrine, the suggestion was judicially made that the application of the principle should be limited, as regards marriages celebrated in England, to cases in which both of the parties are domiciled in a country by the laws of which they are incapable of intermarriage.

"Our opinion [that parties cannot make a valid marriage who are under an incapacity by their *lex domicilii*] . . . is confined "to the case where both the contracting parties are, at the time "of their marriage, domiciled in a country the laws of which "prohibit their marriage. All persons are legally bound to take "notice of the laws of the country where they are domiciled. No "country is bound to recognize the laws of a foreign State when "they work injustice to its own subjects, and this principle would "prevent the judgment in the present case being relied on as an "authority for setting aside a marriage between a foreigner and "an English subject domiciled in England, on the ground of "any personal incapacity not recognized by the law of this "country" (*n*).

(*k*) Compare *Pertreis v. Tondear* (1790), 1 Hagg. Cons. 136.

(*l*) See *Sottomayor v. De Barros* (1879), 5 P. D. 94. The validity of this Exception, and the authority of *Sottomayor v. De Barros*, 5 P. D. 94, was formerly open to doubt, but it has been followed in *Chetti v. Chetti*, [1909] P. 67, 81—88, judgment of Gorell Barnes, P.; and see *Ogden v. Ogden*, [1908] P. (C. A.) 46, *per Curiam*.

(*m*) See *Mette v. Mette* (1859), 1 Sw. & Tr. 416; 28 L. J. P. & M. 117.

(*n*) *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1, 6, 7, *per Curiam*.

Savigny, however, holds that an incapacity affecting a future wife according

The suggested limitation has been acted upon and approved by the Court of Appeal, and must be assumed, in spite of its illogical character, to be good law.

H and *W* are first cousins. *H* is domiciled in England. *W*, the woman, is domiciled in Portugal, and is, under the law of her Portuguese domicil, incapable of marrying *H*. They marry in England. The marriage is valid (*o*), and would equally be valid if *W* had been domiciled in England and *H* in Portugal.

Exception 2(p).—A marriage celebrated in England is not invalid on account of any incapacity which, though imposed by the law of the domicil of both or of either of the parties, is of a kind to which our Courts refuse recognition.

Comment and Illustration.

H, a negro, domiciled in a country where marriages between whites and negroes are prohibited, and *W*, a white woman, also there domiciled, come to England, and, without having acquired an English domicil, are married here. The marriage is valid (*q*).

So the marriage of a monk or a nun would be held valid here, even though he or she might be incapable of marriage by the law of his or her domicil (*r*). So also no rule of caste affecting a British Indian subject is recognized as rendering invalid a marriage otherwise duly celebrated in England (*s*).

to the law of her domicil, but not affecting the future husband according to the law of his domicil, is immaterial. Hence, though he would approve of the decision in *Mette v. Mette*, he would hold that, if in that case the husband had been domiciled in Germany whilst the wife had been domiciled in England, the marriage ought to have been held valid by our Courts. See Savigny, s. 379, pp. 291, 292.

(*o*) *Sottomayor v. De Barros* (1879), 5 P. D. 94. See, however, Westlake's cogent criticism on the judgment in *Sottomayor v. De Barros* (1879), 5 P. D. 94; Westlake, s. 21. But contrast *Ogden v. Ogden*, [1908] P. (C. A.) 46; *Chetti v. Chetti*, [1909] P. 67, 85, 87.

(*p*) See Rule 136, p. 500, *ante*.

(*q*) "It has been decided that State laws forbidding the intermarriage of "whites and blacks are such police regulations as are entirely within the "power of the States, notwithstanding the provisions of the new amendments "to the Federal Constitution." Cooley, *Constitutional Limitations* (6th ed.), 1890, p. 481, note 1.

(*r*) See Co. Litt. p. 136 a; 2 Co. Inst. p. 687. See as to the principle of this Exception, Intro., General Principle II. (B.), p. 34, *ante*, and Rule 136, p. 500, *ante*.

(*s*) *Chetti v. Chetti*, [1909] P. 67, 78. Compare *R. v. Superintendent*

Exception 3.—Any marriage is valid which is made valid by Act of Parliament (*t*).

Comment.

Acts are often passed rendering valid (*u*) marriages, or, rather, attempted marriages, which are invalid on account of the omission of some necessary formality. Such marriages are, of course, valid throughout the British dominions (*x*). The necessary validity in England, at any rate as far as form is concerned, of marriages which comply with the requirements of the Foreign Marriage Act, 1892, is another application of this Exception.

(B) *ASSIGNMENT OF MOVABLES IN CONSEQUENCE OF MARRIAGE* (*y*).

RULE 184 (*z*).—Where there is a marriage contract or settlement, the terms of the contract or settlement govern

Registrar of Marriages for Hammersmith, Ex parte Mir-Anwaruddin, [1917] 1 K. B. (C. A.) 634. A Mahomedan can contract a valid monogamous marriage with an Englishwoman, and such a marriage cannot be dissolved by any action of the husband's under the law of his religion.

(*t*) See Intro., General Principle II. (A.), p. 34, *ante*. and Rule 156, p. 573, *ante*.

(*u*) See, for example, the Marriage Validation Act, 1888 (51 & 52 Vict. c. 28).

(*x*) *Question.*—Can a marriage be valid where the requirements of Rule 182, as to form, are of necessity neglected? (Compare pp. 671, 672, *ante*.)

H and *W*, an Englishman and an Englishwoman domiciled in England, are passengers on board a British ship. The ship is wrecked on a desert island. The crew and the passengers are saved, but have no means of leaving the island. *H* and *W* wish to marry. There is no local form of marriage to follow. There is no minister in holy orders among the shipwrecked persons. *H* and *W* marry *per verba de presenti*, in the presence of their companions. Is such a marriage valid? *Seem*, it is not; the invalidity, however, arises wholly from the strict application of *Reg. v. Millis* (1844), 10 Cl. & F. 534. But for this case the marriage might be good at common law and valid; nor is it quite certain that in the absence of any possibility of compliance either with the local form or with the common law, the marriage might not be held valid within the principle suggested by *Ruding v. Smith* (1821), 2 Hagg. Cons. 371. Compare *Lightbody v. West* (1902), 87 L. T. 138; *Armitage v. Armitage* (1866), L. R. 3 Eq. 343.

(*y*) Story, ss. 143—199; Foote (4th ed.), pp. 312—319; Westlake (5th ed.), ss. 34—42, and chap. ii.; Savigny, s. 379, pp. 292—298; Bar (Gillespie's transl.), pp. 405—427.

(*z*) Capacity to contract, at any rate as regards contracts connected with marriage, depends on the law of a person's domicile (see Rule 158, p. 577, *ante*). Hence the capacity of each one of the parties to an intended marriage to enter into a marriage contract (*i.e.*, execute a settlement before the marriage) depends upon the law of his or her respective domicile at the time of entering into the contract or executing the settlement. *In re Cooke's Trusts* (1887), 56

the rights of husband and wife in respect of all movables within its terms which are then acquired or are afterwards acquired (a).

Comment and Illustrations.

Parties to a marriage contract may regulate their mutual rights to property on whatever terms they think fit, and our Courts will, in general, enforce the terms which the parties have agreed upon. In 1803 *H and W*, British subjects domiciled in England, married in Paris. Their marriage contract stipulated that their rights over property should be regulated in accordance with French law. Under this law a wife has a power of making a will. It was held by our Courts that such a contract was to be enforced, and that the rights of the parties were the same that French subjects would have had under such a contract, and that, therefore, a will by the wife was valid (b).

In 1846 *H*, a domiciled Englishman, marries *W*, a German

L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88; *Viditz v. O'Hagan*, [1900] 2 Ch. (C. A.) 87; with which compare *Duncan v. Dixon* (1890), 44 Ch. D. 211; *Carter v. Silber*, [1892] 2 Ch. (C. A.) 278.

On the dissolution of a marriage by the English Court, the Court has full discretion to vary the terms of the contract or settlement as it thinks fit, even if according to the law of a foreign domicil. *Forsyth v. Forsyth*, [1891] P. 363. Compare *Nunneley v. Nunneley* (1890), 15 P. D. 186. This power is provided for by 22 & 23 Vict. c. 61, s. 5. See also *Lett v. Lett*, [1906] 1 Ir. R. 618, and compare the Scottish case, *Montgomery v. Zarifi*, [1918] S. C. (H. L.) 128. How far a similar power is conceded to foreign Courts is uncertain; the circumstances of *Colliss v. Hector* (1875), L. R. 19 Eq. 334, are too unusual to afford ground for any deduction.

(a) *Story*, s. 143; *Feaubert v. Turst* (1702), Prec. Ch. 207; *Sawer v. Shute* (1792), 1 Anstr. 63; *Anstruther v. Adair* (1834), 2 My. & K. 513; *Williams v. Williams* (1841), 3 Beav. 547; *Este v. Smyth* (1854), 18 Beav. 112; 23 L. J. Ch. 705; *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265; *Bank of Scotland v. Cuthbert* (1813), 1 Rose, 481; *Watts v. Shrimpton* (1856), 21 Beav. 97; *McCormick v. Garnett* (1854), 5 De G. M. & G. 278; *Van Grutten v. Digby* (1862), 31 Beav. 561; 32 L. J. Ch. 179; *Byam v. Byam* (1834), 19 Beav. 58; *De Nicols v. Curlier*, [1900] A. C. 21. The clause against anticipation annexed to a gift to an Englishwoman whose husband is domiciled in a foreign country is valid, and cannot be got rid of even though by the law of the country where the husband is domiciled it is invalid. *Peillon v. Brooking* (1858), 25 Beav. 218.

(b) *Este v. Smyth* (1854), 18 Beav. 112. The form of the marriage contract or settlement ought, it would seem, to depend on the law of the place where it is made. (See Rule 159, p. 583, *ante*.) Our Courts, however, at any rate when one of the parties to a marriage contract is a British subject and the property dealt with is in England, show a strong inclination not to hold it invalid on account of merely formal invalidity under the *lex loci contractus*. (See Exception 3, p. 586, *ante*, to Rule 159; *Van Grutten v. Digby* (1862), 32 L. J. Ch. 179; 31 Beav. 561; *In re Bankes*, [1902] 2 Ch. 333.

domiciled in Prussia, at Cologne. Before marriage they enter into a marriage contract in the Prussian form. By Prussian law the effect of the contract is that *W* is entitled to all immovable and movable property belonging to her at the time of her marriage, and to all property which after her marriage accrues to her by donation or inheritance. Hence certain goods become under the contract the separate property of *W*. *H* becomes bankrupt in England. He holds such goods as trustee for *W*, and the goods, though in his possession, do not pass to his creditors (*c*).

SUB-RULE 1 (*d*).—The marriage contract or settlement will be construed with reference to the proper law of the contract (*e*), *i.e.*, in the absence of reason to the contrary, with reference to the law of the matrimonial domicile (*f*).

Comment and Illustrations.

“It appears to be a well settled principle of law in relation to contracts regulating the rights of property consequent upon marriage, as far at least as personal property is concerned, that, if the parties marry with reference to the laws of a particular place or country as their future domicile, the law of that place or country is to govern as the place where the contract is to be carried into full effect” (*g*).

(*c*) *Ex parte Sibeth* (1885), 14 Q. B. D. 417. On the dissolution of a marriage the relations of the parties are regulated by the law of their domicile. *Swaagman v. Swaagman* (1908), *The Times*, February, 17, 1908.

(*d*) This and the following Sub-Rules are in reality applications of the general principle embodied in Rule 161, *ante*, that the interpretation of a contract is determined in accordance with the law by which the parties may be presumed to have intended that it should be governed. *In re Bankes*, [1902] 2 Ch. 333, 343; and compare *In re Currey* (1886), 32 Ch. D. 361; *In re Hewitt's Settlement*, [1915] 1 Ch. 228. See Rule 155, p. 572, *ante*.

(*e*) For meaning of “proper law of a contract,” see Rule 155, p. 572, *ante*.

(*f*) See *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265; *Byam v. Byam* (1854), 19 Beav. 58; *Colliss v. Hector* (1875), L. R. 19 Eq. 334; *Chamberlain v. Napier* (1880), 15 Ch. D. 614; *Anstruther v. Adair* (1834), 2 My. & K. 513; *Le Breton v. Miles*, 8 Paige, 261 (Am.); 1 Bishop, Law of Marriage and Divorce (5th ed.), s. 404. “The decisions of the English tribunals establish . . . that where there is an express contract it is governed, as to its construction, by the law of the matrimonial domicile.” Phillimore, s. 466.

For meaning of “matrimonial domicile,” see Exception 2 to Rule 150, p. 554, *ante*.

(*g*) *Le Breton v. Miles*, 8 Paige, 261, 265, *per Curiam*. This statement of the law, though extracted from an American case, may be taken as representing the doctrine of English Courts as regards movable property.

H and *W*, persons domiciled in Scotland, marry in London. A marriage contract or settlement is made between them in the Scottish form. *H* and *W* afterwards become domiciled in England. The rights of the parties are nevertheless to be decided with reference to Scottish law; for "this contract, though prepared in England and a valid English contract, is to be governed by the Scotch law, and the construction and operation of it must be the same whether in or out of Scotland" (*h*).

H, a domiciled Scotsman, marries *W*, a domiciled Englishwoman. A settlement in Scottish form is made between *H* and *W* whereby funds belonging to *H* are settled in accordance with Scottish law. A contemporaneous settlement in English form is made between *W*'s father, *W* herself, and *H*, whereby funds belonging to *W* are settled in trust for *W* for life for her separate use, but without power of anticipation. The settlement in Scottish form is to be governed by Scottish law, the settlement in English form is to be governed by English law. *W* can dispose freely by will of savings from separate property included in the English settlement (*i*).

SUB-RULE 2.—The parties may make it part of the contract or settlement that their rights shall be subject to some other law than the law of the matrimonial domicile (*k*), in which case their rights will be determined with reference to such other law.

Illustrations.

1. *H* and *W*, domiciled in England, make it part of their marriage contract that their rights shall be regulated in accordance with the law of France. Our Courts will, as far as possible, give effect to the contract in accordance with French law (*l*).

2. *H*, an Englishman domiciled in England, marries *W*, a

(*h*) *Duncan v. Cannan* (1854), 23 L. J. Ch. 265, 273, *per* Romilly, M. R.

(*i*) *In re Mackenzie*, [1911] 1 Ch. 578.

(*k*) For the signification of this term, see Rule 150, p. 554, *ante*.

(*l*) *Este v. Smyth* (1854), 23 L. J. Ch. 705; 18 Beav. 112; *Duncan v. Cannan* (1854), 18 Beav. 128; *Chamberlain v. Napier* (1880), 15 Ch. D. 614; *In re Barnard* (1887), 56 L. T. 9. Compare *Montgomery v. Zariff*, [1918] S. C. (H. L.) 128. The same result would follow if it could be fairly inferred from the terms of the contract that the intention of the parties (though not expressed in so many words) was that it should be construed with reference to French law. See the Scottish cases, *Lister's Judicial Factor v. Syme*, [1914] S. C. 204; *Battye's Trustee v. Battye*, [1917] S. C. 385.

Scotswoman domiciled in Scotland. They enter into a marriage settlement in Scottish form, under which *H* acquires a life interest in property of *W*. It is part of the settlement that all payments to *H* in respect of this interest "shall be strictly alimentary, and "shall not be assignable nor liable to arrestment or any other "legal diligence at the instance of his creditors." *H* continues during life domiciled in England, and mortgages his life interest under the settlement to English creditors. Though the matrimonial domicile was English, the construction and the effect of the contract depend upon Scottish law, and the mortgage of *H*'s life interest to creditors is invalid (*m*).

SUB-RULE 3.—The law of the matrimonial domicile will, in general, decide whether any particular movable (*e.g.*, any future acquisition) is included within the terms of the marriage contract or settlement.

Comment.

The law with reference to which the marriage contract or settlement is construed, which is in general the law of the matrimonial domicile, must, it is conceived, as far as the question is a matter of law, determine whether any particular class of movable property, *e.g.*, goods and chattels acquired after the marriage, are included within the terms of the contract.

Property not included within the terms of the contract will be regulated by the rules applicable to cases where there is no marriage contract (*n*).

SUB-RULE 4.—The effect or construction of the marriage contract or settlement is not varied by a subsequent change of domicile (*o*).

Comment.

The effect of a contract must depend on the intention of the parties at the time of making it. A marriage contract or settle-

(*m*) *In re Fitzgerald*, [1904] 1 Ch. (C. A.) 573.

(*n*) See Rule 185; *Hoare v. Hornby* (1843), 2 Y. & C. 121; *Anstruther v. Adair* (1834), 2 My. & K. 513; *In re Simpson*, [1904] 1 Ch. (C. A.) 1; *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265; *Watts v. Shrimpton* (1856), 21 Beav. 97; *Phillimore*, s. 476.

(*o*) See *Duncan v. Cannan* (1854), 18 Beav. 128; 23 L. J. Ch. 265.

ment must, therefore, be construed with reference to the law, whatever it was, which the parties had in view when the contract was made, *i.e.*, in general the law of the matrimonial domicile at the time of the marriage. No later change of domicile can affect its meaning.

RULE 185.—Where there is no marriage contract or settlement, and where no subsequent change of domicile on the part of the parties to the marriage has taken place, the rights of husband and wife to each other's movables, whether possessed at the time of the marriage or acquired afterwards, are governed by the law of the matrimonial domicile, without reference to the law of the country where the marriage is celebrated or where the wife is domiciled before marriage.

Comment.

In this form the Rule appears to be justified both by authority and reason (*p*). As the property rights of the parties to a marriage must be governed by some law, it is natural to assume that they will be governed by the law of the matrimonial domicile, *i.e.*, the domicile which the husband has at the time of the marriage save in those rare cases where it is the intention of the husband to acquire a new domicile. The only alternative theory (*q*) which has any plausibility is that the effect of marriage on property should be regulated by the law of the place where the marriage is celebrated, but, although the place of celebration is often also the place of the matrimonial domicile, in those instances where the two differ it seems obvious that it is the law of the matrimonial domicile which should be deemed to regulate the property relations of the parties.

(*p*) See Westlake, s. 36; *Welch v. Tennent*, [1891] A. C. 639, 644, 645; *De Nicols v. Curlier*, [1900] A. C. 21, 32—34, *per* Lord Macnaghten. The last case, however, is not an authority for this Rule, since under French law the result of marriage without a formal contract is equivalent to the conclusion of an express contract adopting the rule of community of property as the principle affecting the marriage.

(*q*) See Story, ss. 158, 159, which, however, are hardly consistent with sects. 186, 187. The discrepancy is probably to be explained by assuming that Story was dealing with cases where the place of celebration was also the place of the matrimonial domicile.

Illustrations.

1. *H*, domiciled in England, marries in London *W*, a Frenchwoman domiciled in France. The rights of the parties to movables are governed by the law of England just as they would be if *H* and *W* were both domiciled in England (*r*).

2. *H*, domiciled in England, marries in Switzerland *W*, a Frenchwoman domiciled in Italy. The rights of the parties to movable property are governed by the law of England.

3. *H*, domiciled in England, marries in France *W*, a Frenchwoman. *W* after her marriage inherits 1,000*l*. The right to the money is governed by the law of England.

4. *H*, domiciled in England, marries *W*, a woman domiciled in France. It is the intention of both parties to go, immediately after the marriage, and settle in Scotland. This intention they forthwith carry out. Their rights over movables are governed by Scottish law (?) (*s*).

5. *H*, domiciled in England, marries *W*, domiciled in Jersey, and settles with her in England. His liability for *W*'s prenuptial debts is governed by the law of England (*t*).

RULE 186.—Where there is no marriage contract or settlement, and where there is a subsequent change of domicile, the rights of husband and wife to each other's movables, both *inter vivos* and in respect of succession, are governed by the law of the new domicile.

Comment.

The Rule rests upon the authority of *Lashley v. Hog* (*u*), a decision in the case of a change of domicile from England to Scotland, which was held by the House of Lords to carry with it the application of Scottish law to the property relations of the husband

(*r*) *I.e.*, *W*'s rights are governed (assuming the marriage to take place after January 1, 1883) by the Married Women's Property Act, 1882, and the Acts amending the same.

(*s*) See p. 554, *ante*; *Colliss v. Hector* (1875), L. R. 19 Eq. 334.

(*t*) *De Greuchy v. Wills* (1879), 4 C. P. D. 392. The discussion of the place of marriage in this case was clearly in its bearing on the matrimonial domicile. Contrast Westlake (5th ed.), s. 235.

(*u*) (1804), 4 Paton, 581. See also *In re Marsland* (1886), 55 L. J. Ch. 581; *Craignish v. Hewitt*, [1892] 3 Ch. (C. A.) 180; *Hall's Trustees v. Hall* (1854), 16 D. 1057, which accept the principle.

and wife, in the absence of an English settlement. This case was distinguished from *De Nicols v. Curlier* by the House of Lords, and the ground (x) of distinction seems clearly to have been the absence of a written contract in *Lashley v. Hog*, while in *De Nicols v. Curlier* the circumstances in the view of French law amounted to the formation of an express contract for community of property.

Moreover, the rule is given statutory validity for the case of a change of domicile from England to Scotland by the Married Women's Property (Scotland) Act, 1920, which lays down a definite code affecting the rights of husband and wife in respect of movable property, and makes it applicable "where the husband is "domiciled in Scotland," without any saving for the case where the matrimonial domicile was not Scottish (y).

It must, of course, be noted that the Rule does not require that the result of a change of domicile shall be to bring the property relations of husband and wife under the same rules as would have applied to them had they been married under the law of their new domicile. Community of goods in France, for instance, is constituted by a marriage under French law, and must commence from the date of the marriage; it cannot, therefore, be applied to a husband and wife who, after being domiciled in England, where they married, acquired a domicile in France (z).

The chief importance of the Rule lies in the sphere of succession. The effect of marriage in many continental countries, apart from any settlement, is to limit definitely the freedom of either husband or wife to dispose by will of their property; by change of domicile to England these fetters on disposal are entirely removed, so that a will made prior to the change of domicile will be interpreted under the unrestricted power given by the new domicile (a). By change, on the other hand, of domicile from England to Scotland, the power of disposal will be limited by operation of

(x) [1900] A. C. 21, 34, 36, *per* Lord Maenaghten; pp. 36, 37, *per* Lord Shand; p. 43, *per* Lord Brampton. This fact is inconsistent with Westlake's view (s. 36a), that the House of Lords distinguished the case on the ground that *Lashley v. Hog* turned on testamentary as opposed to matrimonial law.

(y) 10 & 11 Geo. 5, c. 64, s. 7. Westlake (s. 36a) is in error in citing the Married Women's Property (Scotland) Act, 1881 (44 & 45 Viet. c. 21), s. 1, in support of the view that change of domicile has no effect. The section has no reference to change of domicile. See also ss. 6, 7.

(z) Compare *De Nicols v. Curlier*, [1900] A. C. 21, 33, language of Lord Maenaghten.

(a) See *In re Groos*, [1915] 1 Ch. 572, and p. 736, note (r), *post*.

the principle of legitim, *ius relictæ* and *ius relictî*. But the Rule might prove of importance in other cases. Thus, if a husband and wife were domiciled in a country which did not recognize the principle that a *donatio inter virum et uxorem* is irrevocable, by change of domicile to England, their rights would be varied, such gifts becoming in future irrevocable.

The principle is also applicable in cases affecting the right of husband and wife to maintenance by the other. It is clear under Scottish law (*b*), and doubtless would be accepted under English law, that the mutual rights of husband and wife in this regard are dependent on the domicile of the parties.

In the case of bankruptcy, however, the relation of the claims of husband or wife against the estate of the other to those of other creditors is regulated not by the law of their domicile, but by the law under which the bankruptcy is being administered (*lex fori*) (*c*).

In the case of ordinary mercantile contracts it is probable that the law applicable is that of the place of the making of the contract (*d*).

(*b*) See Married Women's Property (Scotland) Act, 1920, s. 4. Compare *Macdonald v. Macdonald* (1846), 8 D. 830, 836, *per* Lord Mackenzie.

(*c*) Compare *Thurburn v. Steward* (1871), L. R. 3 P. C. 478; *Ex parte Melbourne* (1870), L. R. 6 Ch. 64; Bankruptcy Act, 1914, s. 36.

(*d*) See Rule 158, Exception 1, p. 580, *ante*. Compare Bankruptcy Act, 1914, s. 125.

CHAPTER XXVIII.

TORTS (*a*).

RULE 187 (*b*).—Whether an act done in a foreign country is or is not a tort (*i.e.*, a wrong for which an action can be brought in England) depends upon the combined effect of the law of the country where the act is done (*lex loci delicti commissi*) and of the law of England (*lex fori*).

Comment.

This Rule lays down the principle of which the effect is worked out in Rule 188 and Rule 189 (*c*).

RULE 188 (*d*).—An act done in a foreign country is a tort, and actionable as such in England, if it is *both*

- (1) wrongful, *i.e.*, not justifiable, according to the law of the foreign country where it was done, *and*,
- (2) wrongful, *i.e.*, actionable as a tort, according to English law, or, in other words, is an act which, if done in England, would be a tort (*e*).

(*a*) Westlake, chap. xi.; Foote, pp. 448—469; Story, ss. 307 d, 307 e; Wharton, ss. 474—481; Savigny (Guthrie's transl. (2nd ed.)), s. 374, pp. 253—256; Bar (Gillespie's transl. (2nd ed.)), ss. 286, 287, pp. 634—642.

(*b*) See Intro., p. 38, *ante*; and see Rule 188 and Rule 189, p. 696, *post*; *Chartered Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 536, 537, judgment of Brett, L. J. Compare *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. (Ex. Ch.) 1, 28, 29, judgment of the Court, delivered by Willes, J.; *Curr v. Francis, Times & Co.*, [1902] A. C. 176.

(*c*) It may to a great extent be treated as a result of General Principle No. I. (Intro., p. 23, *ante*), combined with General Principle No. II. (B.). (Intro., p. 34, *ante*.)

(*d*) *Scott v. Seymour* (1862), 1 H. & C. 219 (Ex. Ch.); 32 L. L. Ex. 61.

(*e*) But note that no action can be brought in England for any injury to foreign land, unless the action is in reality one not for trespass to the land but

Comment.

The word "wrongful," it should be noted, bears a somewhat different sense in the two clauses of this Rule. In clause (1) it means an act which is not innocent or excusable, or in other words, which is either actionable or punishable according to the law of the country, *e.g.*, Italy, where it was done; in clause (2) it means an act which, if done in England, would, according to the law of England, be actionable.

Clause (1) is to a great extent an application of the principle enjoining the recognition of rights acquired under the law of any civilized country (*f*), and gives to *A* a *primâ facie* right to bring in England an action for damages against *X* for any wrongful act on the part of *X*, *e.g.*, an assault from which *A* has suffered in Italy, and which is actionable under Italian law. But the clause goes further than is absolutely required by that principle (*f*), and opens the possibility of *A* having the right to recover damages from *X* in England for some act which, though wrongful under the law of Italy, does not under that law give *A* a right of action against *X*. Clause (2) makes the right to bring an action in England for a wrong committed in a foreign country dependent upon the fact that the act complained of would, if done in England, be a tort under English law. Rule 188 is, however, simply affirmative: it derives most of its importance from its connection with Rule 189.

Any defence to the action which is valid under English law is, of course, available to the defendant, although such a defence would not be accepted by the law of the country in which the tort took place. Thus in an action for libel the fact that the words complained of are true will be a good defence in an action in England, although such a defence might not be sufficient in the country in which the words were spoken (*g*).

for a breach of contract either express or implied, in regard to the land, *e.g.*, an implied agreement by a tenant of foreign land, under the law of the foreign country, that he will be liable for damage done to the land through his negligence. Conf. as to implied contract with regard to land, *In re De Nicols*, [1900] 2 Ch. 410. See Rule 53, p. 223, *ante*; *British S. Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, reversing judgment of Court of Appeal, [1892] 2 Q. B. (C. A.) 358.

For the principle affecting damages for tort when the rate of exchange varies, see Rule 181, p. 659, *ante*.

(*f*) See General Principle No. I., p. 23, *ante*, and compare p. 38, *ante*.

(*g*) Compare *Hart v. von Gunpach* (1873), L. R. 4 P. C. 439.

Illustrations.

1. *X*, a British subject, commits what, according to English law, is an assault on *A*, a British subject, at Naples, where the act is wrongful, and damages for it are recoverable by proper proceedings. The assault is a tort (*h*).

2. *X*, an Italian subject, commits what, according to English law, is an assault on *A*, an Italian subject, at Naples, where the act is wrongful, and damages for it are recoverable by proper proceedings. The assault is a tort.

3. *X* publishes at Paris a statement about *A* which, according to English law, is a libel. The publication is wrongful and actionable according to the law of France. The publication is a tort.

4. *X* publishes in a foreign country statements of *A* which would, if published in England, have entitled *A* to maintain an action for libel against *X*. Under the law of such foreign country the publication of these statements is wrongful, *i.e.*, is not justifiable or innocent, but would not be the subject of civil proceedings in such country. The publication of such statements is a tort for which *A* can maintain an action against *X* in England (*i*).

RULE 189.—An act done in a foreign country is not a tort, or actionable as such, in England if it *either*—

- (1) is innocent, *i.e.*, justifiable according to the law of the country where it was done (*k*), or
- (2) is an act which, if done in England, would not be actionable as a tort (*l*).

Comment.

Clause (1) must probably be treated as an application of the general principle that an English Court will not enforce any right which involves interference with the authority of a foreign sovereign within the country whereof he is sovereign. To treat an act done, *e.g.*, in Italy, which by the law of Italy is absolutely,

(*h*) *Scott v. Seymour* (1862), 1 H. & C. 219, 231 (Ex. Ch.); 32 L. J. Ex. 61.

(*i*) *Maehado v. Fontes*, [1897] 2 Q. B. (C. A.) 231.

(*k*) *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. (Ex. Ch.) 1; *Dobree v. Napier* (1836), 2 Bing. N. C. 781; *R. v. Lesley* (1860), 1 Bell, Cro. Cas. 220; 29 L. J. M. C. 97; *Carr v. Francis, Times & Co.*, [1902] A. C. 176; *The Arum*, [1921] P. 12.

(*l*) *The Halley* (1868), L. R. 2 P. C. 193. See as to the ground of the Rule, Intro., p. 38, *ante*.

innocent or justifiable, as a tort, would clearly be an interference with the authority of the Italian sovereign (*m*).

"The rule which obtains in respect of property and civil contracts—namely, that an act, unless intended to take effect elsewhere, shall, as regards its effect and incidents, if a conflict of law arises between the *lex loci* and the *lex fori*, be governed by the former—appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to that comity of nations in matters of law to which effect should, if possible, be given. An act might not only be lawful, but might even be enjoined by the law of another country, which would be wrongful, and give a right of action by our law, and it certainly would be in the highest degree unjust that an individual who has intended to obey the law binding upon him should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justified by the law of a foreign country under circumstances in which it would be actionable here. It would be impossible to hold that in such a case an action could be maintained in an English Court" (*n*).

Clause (2) may be thus explained: The theoretical ground for the refusal of English Courts to entertain an action for an act not tortious under English law is the objection to giving damages, or in effect punishing a proceeding which English law does not condemn (*o*).

The general effect of Rules 188 and 189 taken together, has been thus authoritatively stated:—

"In order to maintain an action here on the ground of a tort committed [in a foreign country (*p*)], the act complained of must be wrongful—I use the word 'wrongful' deliberately—both by the law of this country, and also by the law of the country where it was committed; and the first thing we have to consider is whether those conditions are complied with. In the

(*m*) See Intro., General Principle No. II. (C.), p. 34, *ante*, and p. 38, *ante*.

(*n*) *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225, 239, judgment of Cockburn, C. J. This is so even if the action complained of is done by a British subject who is, illegally by English law, employed in the naval service of a foreign government. *Dobree v. Napier* (1836), 2 Bing. N. C. 781.

(*o*) See Intro., General Principle No. II. (B.), p. 34, *ante*.

(*p*) These words are substituted for "outside the jurisdiction."

“case of *Phillips v. Eyre* (q), Willes, J., lays down very distinctly what the requisites are in order to found such an action. He says this: ‘As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled:—First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.’ Then in *The M. Moxham* (r), James, L. J., in the course of his judgment, uses these words (s):—‘It is settled that if by the law of the foreign country the act is lawful or is excusable, or even if it has been legitimized by a subsequent act of the legislature, then this Court will take into consideration that state of the law—that is to say, if by the law of the foreign country a particular person is justified, or is excused, or has been justified or excused for the thing done, he will not be answerable here’ ” (t).

“I think there is no doubt at all that an action for [*e.g.*] a libel published abroad is maintainable here, unless it can be shown to be justified or excused in the country where it was published.

“We start then from this: That the act in question is *primâ facie* actionable here (u), and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give ” (x).

Hence the question which was once debatable, whether an action could be maintained in England for any act done in a foreign country, unless it is strictly *actionable*, may now be considered to have received its answer. An action is maintainable in England for any act done in a foreign country which would have been a tort if done in England, and is neither innocent, justifiable, nor authorized by the law of the country where the act is done.

(q) L. R. 6 Q. B. 1.

(r) 1 P. D. 107.

(s) *Ibid.*, at p. 111.

(t) *Machado v. Fontes*, [1897] 2 Q. B. (C. A.) 231, 233, judgment of Lopes, L. J. Compare pp. 234, 235, judgment of Rigby, L. J., and *Canadian Pacific Rail. Co. v. Parent*, [1917] A. C. 195.

(u) *I.e.*, would be a tort if done in England.

(x) *Machado v. Fontes*, [1897] 2 Q. B. (C. A.) 231, 235, 236, judgment of Rigby, L. J.

One or two questions still require consideration.

First Question.—Does anything depend upon the answer to the inquiry whether the wrongdoer and the person wronged both or either of them are British subjects?

This inquiry must be answered in the negative.

"If, indeed," says Blackburn, J., with regard to a particular case, "the plea had averred that by the law of Naples no damages are recoverable for an assault, however violent, that would have raised a question upon which I have not at present made up my mind. I doubt whether it would be a good bar, but, supposing it would, I am disposed to think that the fact of the parties being British subjects would make no difference. As at present advised, I think that, when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners. The point, however, is not now raised, and it is unnecessary to express any opinion upon it" (*y*).

This opinion of Lord Blackburn is hesitatingly expressed, but is, it is submitted, clearly sound, and is in part confirmed by a later decision (*z*). It may (if confined to acts done in a civilized country) be accepted to its fullest extent. The civil rights and liabilities of the parties before an English Court are, subject to the rarest exceptions, not affected by their nationality.

Second Question.—How far is an act, wrongful by English law, actionable if committed beyond the limits of a civilized country?

This question applies either to acts done in a country which is not civilized or to acts done on the high seas.

As to acts done in an uncivilized country.—With this matter these Rules are not concerned (*a*). For the statement of such conclusions with regard to it as English cases apparently warrant, readers are referred to the Appendix (*b*).

As to acts done on the high seas.—An act done on board a ship on the high seas is governed by the law of the country (*c*) to

(*y*) *Scott v. Seymour* (1862), 1 H. & C. 219, 237, judgment of Blackburn, J.

(*z*) *Machado v. Fontes*, [1897] 2 Q. B. (C. A.) 231.

(*a*) See Intro., pp. 30, 31, *ante*.

(*b*) See App., Note 2, "Law governing Acts done in Uncivilized Countries."

(*c*) See p. 669, *ante*, as to the question whether in the case of a ship registered, *e.g.*, in Scotland, the law of the country is English or Scottish law, and compare *Aberdeen Arctic Co. v. Sutter* (1862), 6 L. T. 229 (H. L.), 233, *per* Lord Chelmsford.

which the ship belongs, *e.g.*, England, France or Italy. This is obviously the only law applicable where the act in question is done by one person on board the vessel to the detriment of another person also on board the vessel. A more difficult case arises where ships of different countries are engaged in capture of such animals *feræ naturæ* as whales, and disputes arise as to the invasion by the crew of one ship of rights of property in such animals acquired by the crew of another ship; presumably in such a case an action would lie in England only if the act in question were contrary both to English law and to the law of the country to which the ship belongs (*d*). The same principle would, it may be presumed, apply to an act committed upon persons in a foreign ship from an English ship (*e*).

There is, however, an exception to this principle in the case of collisions at sea. There certainly is some ground for the assertion that collisions at sea (*f*), even though both or either of the ships should happen to be foreign ships, since they take place outside the territorial jurisdiction of any State, are in an English Court to be treated as governed by English law; and it is the opinion of Brett, L. J., that "an action for a tort committed on "the high seas between two foreign ships . . . can be maintained in this country although it is not a tort according to the "laws of the Courts in that foreign country" (*g*); and, therefore, in a case where both the ships in collision were Dutch ships, and English plaintiffs brought an action for damage done to their goods by negligence of one of these ships, it has been laid down by Brett, L. J., that "as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign "country, but on the high seas, which are subject to the jurisdic-

(*d*) In cases which have come before English or Scottish Courts (*e.g.*, *Pennings and Others v. Lord Grenville* (1804), 1 Taunt. 241; *Aberdeen Arctic Co. v. Sutter* (1862), 6 L. T. 229 (H. L.)), it has been held that there are customary rules which have become a sort of common law applicable to all ships engaged in the whale fisheries in different localities. See also *Addison v. Row* (1794), 3 Paton, 334, 339, *per* Lord Thurlow.

(*e*) Compare *Madrazo v. Willes* (1820), 3 B. & Ald. 353. An action lies for injuries inflicted by British officers on foreign subjects engaged in the slave trade on the high seas, when such trading is permitted by the foreign law though forbidden by British law to British subjects.

(*f*) Foote, pp. 459—464; Westlake, ss. 200a—205; Marsden, *Law of Collisions at Sea* (7th ed.), pp. 228—230.

(*g*) *Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 537, *per* Brett, L. J.; *Submarine Telegraph Co. v. Dickson* (1864), 15 C. B. (N. S.) 759; 33 L. J. C. P. 139.

"tion of all countries, the question of negligence in a collision
 "raised in a suit in this country is to be tried, not, indeed, by the
 "common law of England, but by the maritime law (*h*), which is
 "part of the common law of England as administered in this
 "country" (*i*).

Prior to 1862, difficult and doubtful questions were raised as to the law relating to collisions between an English and a foreign ship, or between foreign ships on the high seas, or in foreign or in English waters. But it is now unnecessary to discuss them at length, since they were set at rest by the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), which, though repealed, has, as regards this matter, been re-enacted in substance by the Merchant Shipping Act, 1894 (*k*), and the Maritime Conventions Act, 1911.

The following points may be noted:—

1. The limitation of liability under the Merchant Shipping Act, 1894, and the rules as to damages for collision contained in

(*h*) The law indicated is described by the Court of Appeal in *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 125, as "the general maritime law as administered in England, or to avoid periphrasis, the law of England." See *The Segredo* (1853), Spinks, Ecel. & Adm. 36, 45, *per* Dr. Lushington; *The Gaetano and Maria* (1882), 7 P. D. 137, 143, *per* Brett, L. J. The maritime law of Scotland is the same as in England. *Currie v. McKnight*, [1897] A. C. 97, 101, 102. The same conception of a general maritime law may be seen in Lord Stowell's judgment in *The Carl Johan* (1821), 3 Hagg. Adm. 187, and that of the Supreme Court of the United States in *The Belgenland* (1885), 114 U. S. 355, 370, though Westlake (ss. 201, 202) cites these passages in support of his view that the law of the flag determines liability. This law is also recognized to exist in the English decisions which hold that, where the rule of the road at sea has not been determined by international agreement binding on both ships involved in a collision, liability falls to be determined by the old rule observed by maritime nations. *The Zollverein* (1856), Swabey, 96; *The Chancellor* (1861), 14 Moore, P. C. 202; *The Repeater v. The Braga* (1865), 14 L. T. 258. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 418, apart from convention, British collision regulations must be observed by all foreign ships within British jurisdiction, and in any case arising in a British Court concerning matters arising within British jurisdiction, foreign ships shall be treated as regards collision regulations as if they were British ships. Contrast *The Eclipse and The Saxonia* (1862), 15 Moore, P. C. 262, where the British rule was held inapplicable to a collision between a British and a foreign ship in the Solent.

(*i*) See note (*g*), p. 700, *ante*; Carver, s. 709.

(*k*) See Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 503, as amended by the Merchant Shipping (Liability of Shipowners) Act, 1898 (61 & 62 Vict. c. 14), the Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 & 64 Vict. c. 32), and the Merchant Shipping Act, 1906 (6 Edw. 7. c. 48), s. 69.

the Maritime Conventions Act, 1911 (1 & 2 Geo. V. c. 57), apply to any ship, whether British or foreign, either on the high seas or in British territorial waters (*l*).

Thus, a collision takes place in the Mediterranean between an English and a Belgian ship, whereby the latter and her cargo are sunk. In an action against the English ship, the liability of the owner is limited by the provisions of the Merchant Shipping Act, 1894, s. 503 (*m*), and, if the wrongdoer had been the Belgian ship, the liability of the owner would, in an action against the Belgian ship, have been equally limited.

2. In case of a collision in British territorial waters or on the high seas, the owner or master of a foreign ship cannot avail himself of any exemption from, or limitation on (*n*), his liability for damage which is conferred upon him by the law of the ship's flag.

A Spanish ship comes into collision with, and causes damage to, a British ship on the high seas. *X*, the owner of the Spanish ship, is a Spanish subject, and is, by the special circumstances under which the collision takes place, exempted by Spanish law from liability. The exemption does not free him (*o*) from liability (*p*).

A Spanish ship comes into collision with, and causes damage to, a French ship on the high seas. *X*, the owner, is a Spanish subject, and is, under the special circumstances of the case,

(*l*) *The Amalia* (1863), 1 Moore, P. C. N. S. 471, 474, 475, judgment of Dr. Lushington. Compare, as to the state of the law under the Merchant Shipping Act, 1854, *Cope v. Doherty* (1858), 4 K. & J. 367; 2 De G. & J. 614; *The Wild Ranger* (1862), Lush. 553; *General Iron Screw Co. v. Schurmanns* (1860), 1 J. & H. 180. The liability of foreign shipowners was unlimited, that of British limited by the Act.

(*m*) *The Amalia* (1863), 1 Moore, P. C. N. S. 471. The Merchant Shipping Act, 1894, s. 503, re-enacts in substance the Merchant Shipping Act, 1862, s. 54, under which this case is decided. Compare *The Kronprinz Olav*, [1921] P. (C. A.) 52.

(*n*) *The Leon* (1881), 6 P. D. 148; *Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 537, 544; *The Wild Ranger* (1862), Lush. 553; *The Zollverein* (1856), Swabey, 96. See Foote (4th ed.), pp. 463—465; but contrast Westlake, ss. 202, 202A. Mr. Westlake appears to incline to the opinion that apart from statute the liability of a foreign shipowner or master depends on the law of the flag. This view, however, ignores the insuperable difficulty of dealing with a case in which there were counterclaims and a divergence in the laws of the flags.

(*o*) *I.e.*, in proceedings in an English Court.

(*p*) *The Leon* (1881), 6 P. D. 148.

exempted by Spanish law from liability. *Semble*, the exemption does not free him from liability (*q*).

Third Question.—Do Rules 188 to 189 apply to an action grounded, not on a tort or wrong in the strict sense of that term, committed in a foreign country, but upon the breach in such country of a quasi-contract existing under the law of such country?

The reply must (*semble*) be in the negative. *X* may be sued in England for the breach in a foreign country of a quasi-contract existing under the law thereof, though no such quasi-contract is known to the law of England (*r*). But it may often be a difficult matter to determine whether an action brought in respect of an act done in a foreign country is in truth grounded upon a tort or upon the breach of a quasi-contract existing under the law of such country.

Illustrations.

1. *X*, a British subject, seizes in Portugal the goods of *A*, a British subject, under circumstances which make the seizure lawful according to Portuguese law, though the seizure would have been wrongful if it had taken place in England. The seizure is not a tort (*s*).

2. *X* imprisons *A* in Jamaica under circumstances which, if the act had been done in England, would have rendered *X* liable to an action for false imprisonment. The imprisonment is not wrongful according to the law of Jamaica. It is not a tort (*t*).

3. A British ship, through negligence of the master and crew, comes into collision with and damages a boat of *A*'s in a foreign harbour. *X* is the owner of the British ship. Under the law of the foreign country he is not liable for damage caused by the negligence of the master and crew of his ship. *X* has not committed a tort (*u*).

4. The *Halley*, a British ship, of which *X*, a British subject, is owner, comes into collision with and damages, when in Belgian

(*q*) *Conf. Chartered Mercantile Bank of India v. Netherlands, &c. Co.* (1883), 10 Q. B. D. (C. A.) 521, 537, judgment of Brett, L. J.

(*r*) *Batthyany v. Walford* (1887), 36 Ch. D. (C. A.) 269.

(*s*) *I.e.*, is not actionable in England. Compare *Dobree v. Napier* (1836), 2 Bing. N. C. 781; *Blad's Case* (1673), 3 Swanst. 603, and *Blad v. Bamfield* (1674), 3 Swanst. 604; *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1, 29, judgment of Willes, J.

(*t*) See *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1. *Conf. Reg. v. Lesley* (1860), 1 Bell, Cro. Cas. 220; 29 L. J. M. C. 97.

(*u*) Compare *The M. Mowham* (1875), 1 P. D. 43.

waters, the ship of *A*. The damage is caused through the negligence of *N*, a pilot, whom *X*, by Belgian law, is compelled to employ. *X* is, under Belgian law, liable to an action for the damage done to *A*'s ship; under English law (*x*) *X* is, on the ground of his employing *N*, protected from liability. *X*'s act is not a tort (*y*).

5. *X* publishes in writing in a foreign country a false and defamatory statement concerning *A*'s deceased father, for which *X* is, under the law of such foreign country, liable to an action for damages. The statement would not render *X* liable to an action if published in England (*z*). *X* has not committed a tort.

6. *D*, the possessor of Austrian entailed estates, died domiciled in England, and leaving property in England. By the law of Austria such possessor of entailed estates is under an obligation to hand over or pass the property at his death to his successor in as good a condition as when he received it, and his representative is bound, after the deceased's death, to make good deterioration which has taken place during the deceased's possession. The entailed estates have suffered deterioration whilst in the possession of *D*. *X* is *D*'s executor. *A*, the successor, can maintain an action against *X* for the amount due in respect of the deterioration of the estates, *i.e.*, for a breach of the quasi-contract on the part of *D* (*a*).

SUB-RULE.—An act done in a foreign country which, though wrongful under the law of that country at the moment when it was done, has since that time been the subject of an Act of Indemnity passed by the legislature of such country, is not a tort (*b*).

(*x*) See *Beechgrove Steamship Co. v. Aktieselskabet Fjord of Kristiania*, [1916] 1 A. C. (Sc.) 364; 85 L. J. P. C. 1; *Forbes v. Eastern & Australian Steamship Co.*, [1916] 2 A. C. 556; *The Andoni*, [1918] P. 14; *The Mickleham*, [1918] P. 166.

(*y*) *The Halley* (1868), L. R. 2 P. O. 193. Compare *The Dallington*, [1903] P. 77. But since the abolition of the rule that compulsory pilotage is a ground of exemption from liability under English law (from Jan. 1, 1918, under the Pilotage Act, 1913, s. 15), presumably the case would be decided otherwise; Marsden, *Law of Collisions*, p. 338. As to the effect of the Act, see also *The Arum*, [1921] P. 12.

(*z*) See *Rex v. Topham* (1791), 4 T. R. 126; *Reg. v. Labouchere* (1884), 12 Q. B. D. 320.

(*a*) *Batthyany v. Walford* (1887), 36 Ch. D. (C. A.) 269.

(*b*) *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. (Ex. Ch.) 1.

Illustration.

X assaults and imprisons A in Jamaica. At the time of the assault, X's act is wrongful both by the law of Jamaica and by the law of England. The assault takes place for the purpose of suppressing a rebellion. The legislature of Jamaica afterwards passes an Act of Indemnity under which the assault is made lawful. The assault is, after the passing of this Act, not a tort (b).

(b) *Phillips v. Eyre* (1869), L. R. 4 Q. B. 225; (1870), L. R. 6 Q. B. (Ex. Ch.) 1.

CHAPTER XXIX.

ADMINISTRATION IN BANKRUPTCY.

RULE 190 (*a*).—The administration in bankruptcy of the property of a bankrupt which has passed (*b*) to the trustee is governed by the law of the country where the bankruptcy proceedings take place (*lex fori*) (*c*).

Comment.

A creditor, whether an alien or a British subject, can under an English bankruptcy (*d*) prove for any debt, whether it be an English or a foreign debt (*e*), which is due to him from the bankrupt. But a foreigner proving (*e.g.*, for a foreign debt) stands in the same position as does an English creditor proving for an English

(*a*) See Westlake, ss. 145—148a; *Ex parte Melbourn* (1870), L. R. 6 Ch. 64, especially p. 69, judgment of Mellish, L. J.; *Ex parte Holthausen* (1874), L. R. 9 Ch. 722. And see *Thurburn v. Steward* (1871), L. R. 3 P. C. 478. Compare *Pardo v. Bingham* (1868), L. R. 6 Eq. 485, and *In re Kloebe* (1884), 28 Ch. D. 175, which, though referring to the administration of a deceased person's estate, throws some light on the law governing administration in bankruptcy.

(*b*) For the effect of an English bankruptcy as an assignment, see Rule 81, p. 364, *ante*, and as a discharge, see Rule 82, p. 371, *ante*, and Rule 128, p. 483, *ante*.

(*c*) This Rule is in reality an application of the principle that all matters of procedure are governed by the *lex fori*. See chap. xxxii., Rule 203, p. 761, *post*.

(*d*) As the Rules in this Digest are concerned only with proceedings in England, our Rule, though expressing the general principle followed by English Courts, applies in effect only to an English bankruptcy, and means substantially that under such a bankruptcy the property which has passed to the trustee, *i.e.*, the bankrupt's assets, must be distributed wholly in accordance with the ordinary rules of the English bankruptcy law.

The word "assets," though in this Digest appropriated to the personal property of a deceased person for which an administrator is accountable, is both popularly and legally applicable to the property of a bankrupt which passes to the representative of the creditors for distribution among them.

(*e*) *Ex parte Melbourn* (1870), L. R. 6 Ch. 64. Compare *In re Kloebe* (1884), 28 Ch. D. 175.

debt; the equities available under the law of England against a bankrupt are available against a bankrupt or the trustee as representing him, in respect of rights acquired under the law of a foreign country (*f*). The distribution of the assets among the creditors; the priorities among the creditors *inter se* (*g*); every matter, in short, which concerns the administration of the bankrupt's assets, or, in other words, which can be brought under the head of procedure in the very widest sense of that term—is to be determined in accordance with the ordinary rules of English bankruptcy law; and this is so even though the assets are the proceeds of foreign immovables, *e.g.*, Scottish land, which under the English Bankruptcy Act has passed to the trustee.

Whilst, however, the mode of dealing with the property which has passed to the trustee, or rather with the proceeds thereof, is governed by the law of England, the question what is the property which has passed to a trustee, and subject to what charges it has passed to him, or, speaking generally, what are the rights of the bankrupt which have passed to the trustee, is a matter to be determined in each case by its appropriate law, *e.g.*, if the right be a right to land in Scotland, then by Scottish law; if the right be acquired under a contract made in a foreign country, then by the law governing the contract, which in many instances will be the law of the foreign country (*lex loci contractus*). We come round, in fact, to the general principle that matters of *procedure* are governed by the *lex fori*, but matters of *right* are governed by the law in accordance with which the particular kind of right is to be determined (*h*).

Question.—How far are the special rules of English bankruptcy law as to the effect of bankruptcy on antecedent transactions (*i*) enforceable against foreign creditors?

As regards transactions occurring within the British dominions the answer is clear: the Bankruptcy Act, 1914, applies to them as to transactions occurring in the United Kingdom. As regards transactions in countries not forming parts of the British dominions, the answer probably is that these rules may be looked upon as matters of procedure, and will, *e.g.*, as to the effect of a fraudu-

(*f*) *Ex parte Holthausen* (1874), L. R. 9 Ch. 722.

(*g*) *Ex parte Melbourn* (1870), L. R. 6 Ch. 64.

(*h*) See, as to procedure, chap. xxxii., p. 761, *post*.

(*i*) See Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 40—44, taken together with the definition of "property" in sect. 167. See also p. 364, *ante*.

lent preference, be enforced against a foreign creditor who proves for his debt under an English bankruptcy (*k*).

Illustrations.

1. *H* and *W* are married in Batavia, and before marriage enter into a contract whereby £1,000 is settled on *W* for her separate use. By Batavian law, such a marriage contract has no effect as regards third persons until registered. The contract is never registered. *H* and *W* come to England. *H* is there made bankrupt. *W* claims to prove for the £1,000. The Batavian law as to registration affects a question of remedy or procedure. All questions of priority of creditors are governed by English law (*lex fori*), and *W* is entitled under the English bankruptcy to prove for debt *pari passu* with other creditors (*l*).

2. *N*, a merchant in London, obtains a loan from *A*, a merchant in Prussia, by depositing with *A* the title deeds of a house at Shanghai. No conveyance or memorandum of deposit is made at Shanghai, and the house remains registered there in the name of *N*. *N* is adjudicated a bankrupt in England. Under English law *A* is entitled as against *N* to have the benefit of the contract, and has a lien on the house at Shanghai. *A*'s rights against *T*, the trustee, are governed by English law (*lex fori*). *T* is bound by the equities which bind the bankrupt, and *A* is entitled to have the house sold and the proceeds thereof, up to the amount of the debt to *A*, transferred to him (*m*).

3. *N* makes a gift of goods to *A* in France. The gift is made after *N* has committed an act of bankruptcy. Within a month after the making of the gift *N* is adjudicated bankrupt in England. *A* proves for a debt incurred in France and under French law by *N* to *A*. The relation of the trustee's title back, and the effect of such relation on the gift of *N* to *A*, is (*semble*) governed by English law (*lex fori*) (*n*).

(*k*) This is apparently the principle maintained in Scotland. "There is," writes Goudy, "little authority in the law of Scotland on the subject, but, so far as the decisions go, it would appear that our Courts will, whenever they have jurisdiction, enforce our special laws of bankruptcy upon foreign creditors." Goudy, *Law of Bankruptcy in Scotland* (4th ed.), pp. 606, 607, citing *Blackburn, Petr.*, Feb. 22, 1810, F. C.; *Selkrig v. Davis* (1814), 2 Rose, 291; *Ex parte Wilson* (1872), L. R. 7 Ch. 490; *White v. Briggs* (1843), 5 D. 1148. Compare also *Ex parte Robertson* (1875), L. R. 20 Eq. 733.

(*l*) *Ex parte Melbourn* (1870), L. R. 6 Ch. 64, 68, 69. Compare *Thurburn v. Steward* (1871), L. R. 3 P. C. 478.

(*m*) *Ex parte Holthausen* (1874), L. R. 9 Ch. 722. See especially pp. 726, 727, judgment of James, L. J.

(*n*) Compare *Ex parte Robertson* (1875), L. R. 20 Eq. 733.

CHAPTER XXX.

ADMINISTRATION AND DISTRIBUTION OF
DECEASED'S MOVABLES.

(A) ADMINISTRATION.

RULE 191 (*a*).—The administration of a deceased person's movables (*b*) is governed wholly by the law of the country where the administrator acts, and from which he derives his authority to collect them (*c*), *i.e.*, in effect, by the law of the country where the administration takes place (*lex fori*) (*d*).

Such administration is not affected by the domicile of the deceased (*e*).

In this Rule, the term "administration" does not include distribution.

Comment.

"The established rule now is that in regard to creditors the "administration of assets of deceased persons is to be governed "altogether by the law of the country where the executor or

(*a*) Story, s. 524; *Lawrence v. Kitteridge* (1852), 21 Conn. 577; Westlake (5th ed.), ss. 104, 105, 110, 111; Foote, pp. 297—299. Mr. Foote does not absolutely agree with the Rule as here laid down. *Preston v. Melville* (1840), 8 Cl. & F. 1; *In re Kloebe* (1884), 28 Ch. D. 175.

(*b*) As to the administration and devolution of a deceased person's immovables see pp. 547, 548, *ante*, and note that the administration of such immovables which now passes, with the most limited exception, to the personal representative of the deceased, is governed, in most points, by the same rules as the administration of his movables. See Land Transfer Act, 1897, s. 2, sub-s. (3). All the assets of the deceased are, under an English administration, administered in accordance with the law of England. See also App., Note 25, "Questions where Deceased leaves Property in different Countries."

(*c*) Story, s. 424.

(*d*) See, as to principle that procedure is governed by the *lex fori*, chap. xxxii., p. 761, *post*.

(*e*) Compare *Cook v. Gregson* (1854), 2 Drew, 286, taken together with *In re Kloebe* (1884), 28 Ch. D. 175, 176, 180, judgment of Pearson, J. But see Foote, pp. 297—299, and *Wilson v. Dunsany* (1854), 18 Beav. 293.

“ administrator acts, and from which he derives his authority to collect them, and not by that of the domicile of the deceased ” (f).

“ Every administrator, principal (g) or ancillary (h), must apply the assets reduced into possession under his grant in paying all the debts of the deceased, whether contracted in the jurisdiction from which the grant issued or out of it, and whether owing to creditors domiciled or resident in that jurisdiction or out of it, in that order of priority, which according to the nature of the debts or of the assets is prescribed by the law of the jurisdiction from which the grant issued ” (i).

This exposition of the law has received judicial approbation (k), and, in regard to an English administration, with which alone we are practically concerned, leads to the following results:—

First. The assets in the hands of the English administrator, wherever collected, are liable for all the debts of the deceased, whether incurred in England or a foreign country (l).

Secondly. In the payment of creditors, all questions of priority are, it would seem, governed wholly by English law (*lex fori*) (m).

The principle of English law appears to be, that every question as to the order in which debts of different kinds are to be paid is a matter of procedure, and therefore to be determined in accordance with the *lex fori* (n), and hence that an English administrator, in reference to the assets which he is administering under an English grant, must follow the order of priority prescribed by English law; and this whether the creditor claiming payment be an English or foreign, *e.g.*, a French, creditor (o).

(f) Story, s. 524.

(g) A “ principal administrator ” means an administrator acting in or under the law of the country where the deceased person whose property is being administered died domiciled.

(h) An “ ancillary administrator ” means an administrator who is not a principal administrator.

(i) Westlake, s. 110.

(k) *In re Kloebe* (1884), 28 Ch. D. 175, 178, judgment of Pearson, J.

(l) *In re Kloebe* (1884), 28 Ch. D. 175, in which it was held that, in the administration of the English estate of a person dying domiciled abroad, foreign creditors were entitled to dividends *pari passu* with English creditors. *Semble*, there were in this case no foreign assets.

(m) *In re Kloebe*; *In re Hewit*, [1891] 3 Ch. 568; *In re Doetsch*, [1896] 2 Ch. 836, 839; *In re Smith*, [1913] 2 Ch. 216. But compare Foote, pp. 298, 299, where doubt is expressed as to the correctness of this statement; and also 1 Williams, Executors (11th ed.), pp. 764—767.

(n) See chap. xxxii., p. 761, *post*.

(o) It has, however, been judicially suggested that, if French assets “ were distributed [in France] so as to give French creditors, as such, priority in

A suggestion (*p*), however, has been made that where the deceased has died domiciled abroad, and therefore the administration is an ancillary administration, the English administrator ought to look partly to the law of the deceased's domicile, in reference, at any rate, to debts there contracted; but there does not appear to be any sufficient authority in support of this view, which is opposed to the marked tendency of English Courts to determine all matters of procedure, in the most extensive sense of that term, in accordance with the *lex fori* (*q*).

Thirdly. The principle that an English administrator must, in the administration of the deceased's estate, follow English law exclusively, applies, it would seem, only to assets which he holds as English administrator.

If, for example, he has in England assets collected in a foreign country, *e.g.*, Ireland, under an Irish grant, then these foreign assets should be dealt with in accordance with the law of Ireland. The same person in effect fills a twofold character, *viz.*, that of an English administrator and of an Irish administrator, and such Irish assets he holds and must administer as an Irish administrator (*r*).

It must be borne in mind that the word "administration" is in this Rule not used in its most extensive sense: it here means simply the clearing of the deceased's estates from liabilities; it does not include the distribution of the residue or surplus which remains after the estate is cleared among the persons entitled to succeed beneficially thereto. This point is manifestly determinable in accordance with the rules governing the right of beneficial succession (*s*).

Illustrations.

1. The deceased has died owing to *A*, an Englishman, a debt of £20, contracted in England, and to *B*, a Frenchman, a debt

"distributing the English assets, the Court would be astute to equalise the payments, and take care that no French creditors should come in and receive anything till the English creditors had been paid a proportionate amount." *In re Kloebe* (1884), 28 Ch. D. 175, 177, judgment of Pearson, J.

(*p*) See Foote, pp. 298, 299; and compare *Wilson v. Dunsany* (1854), 18 Beav. 293; *Cook v. Gregson* (1854), 2 Drew. 286. But *Wilson v. Dunsany* is disapproved. *In re Kloebe* (1884), 28 Ch. D. 175, 180, judgment of Pearson, J.

(*q*) See chap. xxxii., Rule 203, p. 761, *post*.

(*r*) *Cook v. Gregson* (1854), 2 Drew. 286; and compare *In re Kloebe* (1884), 28 Ch. D. 175, 178, judgment of Pearson, J.

(*s*) See chap. xxxi., p. 716, *post*.

of £30, contracted in France. The assets in the hands of the deceased's English administrator are liable for both debts (*t*).

2. The deceased owes £20 to *A* on an English judgment, and owes £20 to *B* on a Victorian judgment, which for this purpose is a simple contract debt. The £20 due on the English judgment must be paid by the English administrator to *A* in priority to the £20 due to *B* on the Victorian judgment (*u*).

3. The deceased, an Englishman residing in Venezuela, has executed an instrument to secure payment to *A* of £1,600. *A* afterwards registers the instrument in the form prescribed by the law of Venezuela, and by that law becomes thereby entitled to have his debt paid out of the general assets of *T* in priority to other creditors. This does not entitle *A* to priority of payment out of assets administered in England (*x*).

(B) DISTRIBUTION.

RULE 192 (*y*).—The distribution of the distributable residue of the movables of the deceased is (in general) governed by the law of the deceased's domicile (*lex domicilii*) at the time of his death (*z*).

Comment.

The ultimate aim of an administration (*z*) (if that word be taken in its widest sense) is the due distribution by the administrator of the distributable residue of the deceased's assets among the persons entitled to succeed beneficially thereto.

(*t*) *In re Kloebe* (1884), 28 Ch. D. 175.

(*u*) See *Cook v. Gregson* (1854), 2 Drew. 286, together with *Harris v. Saunders* (1825), 4 B. & C. 411.

(*x*) *Pardo v. Bingham* (1868), L. R. 6 Eq. 485. But in this case the assets were equitable assets, and, further, Romilly, M. R., seems to have been of opinion that the administration might be affected by the domicile of the debtor and creditor. "Unless both the debtor and the creditor were domiciled in 'Venezuela, I think that the registration of this document can only affect assets 'in Venezuela over which that country has power.'" *Ibid.*, p. 487, per Romilly, M. R. Whether domicile has any effect? Compare Westlake, s. 111.

(*y*) See chap. xxxi., *post*. As to the succession to or distribution of immovables in accordance with the *lex situs*, whether they form part of the deceased's real estate or personal estate, see pp. 547, 548, and p. 709, note (*b*), *ante*.

(*z*) See pp. 336—338, *ante*. For a statutory recognition of the principle, see the Presumption of Life Limitation (Scotland) Act, 1891 (54 & 55 Vict. c. 29), s. 3.

Distribution, therefore, follows the appropriate rule as to succession, and the succession to, and therefore the distribution of, a deceased's movables is, whether he die intestate (*a*) or testate (*b*) (in general) (*c*), governed by the law of his domicile at the time of his death.

Meaning of law of domicile.—The law of the deceased's domicile in reference to succession means the rules applicable to succession in the case of the particular intestate or testator by the law of the country where he dies domiciled, which in the instance, for example, of an Englishman dying domiciled in a foreign country, need not be the same as the ordinary rules applicable to the case of succession to the property of native (*e.g.*, French) intestates (*d*) or testators.

Law at time of death.—The law which, as far as regards English Courts, governs the succession to a deceased's movables is the law of the deceased's domicile as it stands "at the time of his death"; and this qualification is of importance, for, if a change with retrospective operation is made in that law after the death of the intestate or testator, the succession to, and therefore the distribution of, his movables in England is not affected by the change (*e*).

Our Rule, in short, amounts to this: that English Courts will in general distribute the movables of a deceased person exactly as the Courts of his domicile would distribute them at the time of his death.

Question.—How is the duty of distribution to be performed when the deceased dies domiciled in a foreign country?

The distribution may be carried out either by the English administrator on his own authority, or by or under the direction of the Court (*e.g.*, where an administration action has been brought).

(1) *Distribution by administrator.*—When the deceased dies domiciled in a foreign country, *e.g.*, Victoria, the English

(*a*) As to intestate succession, see chap. xxxi., Rule 193, *post*.

(*b*) As to testamentary succession, see chap. xxxi., Rules 194 to 197, and compare Rules 198, 199, pp. 740, 744, *post*.

(*c*) As to exceptions, none of which refer to intestate succession, see Exceptions 1 and 2 to Rule 195, pp. 725, 729, *post*; Rule 197, p. 732, *post*, and Rules 198—200, *post*.

(*d*) See *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431. Compare *In Goods of Lacroix* (1877), 2 P. D. 94; 2 Williams, Executors (11th ed.), p. 1254, and 1 *Ibid.* p. 271, cited p. 81, note (*x*), *ante*.

(*e*) *Lynoh v. Government of Paraguay* (1871), L. R. 2 P. & D. 268; *In re Aganoor's Trust* (1895), 64 L. J. Ch. 521; Story, s. 481.

administrator (who must in this case be an ancillary administrator) should, after payment of all debts and other claims proved in England—assuming, of course, there is no administration action pending in England—hand over the distributable residue to the personal representative of the deceased under the law of Victoria. This course is open to the English administrator (*f*), and, unless he takes the direction of the Court, is (it is conceived) his only safe course.

(2) *Distribution by Court*.—The Court may at its discretion adopt either of two different methods of distribution.

The Court may, on the one hand, hand over the distributable residue to the personal representative of the deceased under the law of his domicile, and leave to such representative the distribution thereof among the beneficiaries. If this course is taken, all persons who, whether as next of kin or otherwise, claim a share in the deceased's estate, must enforce their claims before the tribunals of his domicile (*g*).

The Court may, on the other hand, determine for itself what is the law of the deceased owner's domicile, and who are the persons who, in accordance with such law, are entitled to succeed to the

(*f*) See Westlake, s. 105; *Eames v. Hacon* (1880), 16 Ch. D. 407; (1881), 18 Ch. D. (C. A.) 347; *Re Kloebe* (1884), 28 Ch. D. 175; *De Mora v. Concha* (1885), 29 Ch. D. (C. A.) 268, especially 284, observation of Fry, L. J.; *Re Trufort* (1887), 36 Ch. D. 600, 611, judgment of Stirling, J.; *In re De Penny*, [1891] 2 Ch. 63, 68, judgment of Chitty, J.; *Ewing v. Orr-Ewing* (1885), 10 App. Cas. 453, especially pp. 502—504, 509, 510, and pp. 463, 464, note; 2 Williams, Executors (11th ed.), pp. 1277—1281.

The English administrator cannot rightly or safely undertake on his own responsibility to distribute the surplus directly among the persons entitled thereto under the law of Victoria. An administrator would in cases of difficulty obtain the direction or sanction of Court. See *e.g.*, Ord. LV. rr. 3, 4.

(*g*) See especially *Enohin v. Wylie* (1862), 10 H. L. C. 1, 13, 14; 31 L. J. Ch. 402, 405, 406. Compare *Eames v. Hacon* (1880), 16 Ch. D. 407; (1881), 18 Ch. D. (C. A.) 347. This, according to Lord Westbury, is the course which the Courts *must* take; and, though his view that the Courts of the domicile have exclusive jurisdiction must now be considered overruled (*Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 39; (1885), 10 App. Cas. 453, 502, 504), yet the course recommended by him is still open to the Court. Compare Westlake, s. 106; "Where there is an action for administration in England, it is doubtful whether the Court will insist on carrying that action out to its full completion, by distributing the surplus with such light as it can obtain on the law of the deceased's foreign domicile, or will hand over the surplus to a representative of the deceased in the domicile." *Ibid.* citing *Weatherby v. St. Giorgio* (1843), 2 Hare, 624; *Meiklan v. Campbell* (1857), 24 Beav. 100; *Innes v. Mitchell* (1857), 1 De G. & J. 423.

deceased's movables, and, having determined this, distribute in accordance with such law, the distributable residue remaining in the hands of the English administrator (*h*).

(*h*) The right of the Court to pursue this course was apparently disputed by Lord Westbury (see *Enohin v. Wylie* (1862), 10 H. L. C. 1, 12). But his view has not obtained acceptance. *Ibid.* p. 19, judgment of Lord Cranworth; pp. 23, 24, judgment of Lord Chelmsford; and *Ewing v. Orr-Ewing* (1883), 9 App. Cas. 34, 39, judgment of Selborne, C. See also *In re Bonnefoi, Surrey v. Perrin*, [1912] P. (C. A.) 233.

CHAPTER XXXI.

SUCCESSION TO MOVABLES.

(A) *INTESTATE SUCCESSION.*

RULE 193 (a).—The succession to the movables (b) of an intestate is governed by the law of his domicile at the time of his death, without any reference to the law of the country where

- (1) he was born, or
- (2) he died, or
- (3) he had his domicile of origin, or
- (4) the movables are, in fact, situate at the time of his death.

Comment.

“The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatsoever to the place either of the birth or the death [or the domicile of origin], or the situation of the property at that time” (c). “The universal doctrine, now recognised by the common law, although formerly much contested, is, that

(a) See 2 Williams, *Executors* (11th ed.), p. 1254; Story, ss. 480—481 a; *Bruce v. Bruce* (1790), 6 Bro. P. C. 566; *Somerville v. Somerville* (1801), 5 Ves. 749 a; *Stanley v. Bernes* (1831), 3 Hagg. Ecc. 373; *Doglion v. Crispin* (1866), L. R. 1 H. L. 301.

As to a case in which, though the deceased is permanently settled in a foreign country, not forming part of the British dominions, his domicile at death for the purpose of intestate succession may still possibly be his domicile of origin, e.g., Canada, see *In re Johnson*, [1903] 1 Ch. 821; the New South Wales case, *Simmons v. Simmons* (1917), 17 S. R. (N. S. W.) 419; and Appendix, Note 1, “Law of a Country and the *Renvoi*.”

(b) Note the difference between “movables” and “personalty,” pp. 75—77, *ante*. Chattels real are not included in movables; they are immovables, and devolve in the case of intestacy in accordance with the *lex situs* (see Rule 150, p. 542, *ante*), i.e., in accordance with the Statute of Distribution (22 & 23 Car. II. c. 10); *Duncan v. Lawson* (1889), 41 Ch. D. 394.

(c) 2 Williams, *Executors* (11th ed.), p. 1254.

"the succession to personal property is governed exclusively by the law of the actual domicile of the intestate at the time of his death (d). . . . It is of no consequence what is the country of the birth of the intestate, or of his former domicile, or what is the actual *situs* of the personal property at the time of his death; it devolves upon those who are entitled to take it, as heirs or distributees, according to the law of his actual domicile at the time of his death" (e).

The Rule applies, be it noted, only to the *succession* in the strict sense of that term. Where a person dies, *e.g.*, intestate and a bastard, so that under the law of the country where he is domiciled there is no succession to his movables, but they are *bona vacantia*, and leaves movables situate in a country, *e.g.*, England, in which he is not domiciled, the title to such movables is governed by the *lex situs*, *i.e.*, under English law the movables being situate in England, the Crown is entitled thereto (f).

Illustrations.

1. A French subject dies intestate and domiciled in England. Succession to his movables is governed by the English Statute of Distribution, without any reference to the law of France.

2. A British subject domiciled in France dies intestate in London. The succession to the furniture of his house in London is governed by the rules which regulate in France succession to the movables of a British subject dying domiciled in France.

3. An Englishman domiciled in Scotland, but residing in England, dies in England intestate, and leaves there money and other goods. The deceased whilst domiciled in Scotland had a son, A, by M, and afterwards, being still domiciled in Scotland, married M, whereby A is under Scottish law legitimated. At the time of the intestate's death M is dead, and A is the intestate's only surviving relative. A is entitled to succeed to the money and goods in England (g).

(d) For meaning of "law of domicile at time of death," compare p. 713, and p. 81, note (x), *ante*.

(e) Story, s. 481. The terms "personal estate" and "personal property" must in these quotations be taken as equivalent to movables. See *Freke v. Carbery* (1873), L. R. 16 Eq. 461; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541.

(f) *In re Barnett's Trusts*, [1902] 1 Ch. 847. The doctrine acted upon in this case is clearly laid down in Bar (Gillespie's transl. (2nd ed.)), p. 843.

(g) See *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266; *Dalhousie v. McDouall* (1840), 7 Cl. & F. 817; *Vaucher v. Solicitor to Treasury* (1888), 40

4. A British subject domiciled in Portugal dies there intestate, leaving no relative except *A*, an illegitimate son, who by Portuguese law is entitled to succeed to the intestate's property. The intestate leaves movables in England. *A* is entitled to succeed to the movables (*h*).

5. *N*, a Scotsman domiciled in Scotland, after the birth of *A*, his illegitimate son, has married *A*'s mother, whereby *A* is legitimated under Scottish law. *N*, though domiciled in Scotland until the time of his marriage, acquires after the marriage an English domicile, and at his death is domiciled in England, where he leaves goods. *N* dies intestate in England after the death of his wife, and leaves no surviving relative except *A*. *A* is entitled to succeed to the goods (*i*).

6. A British subject dies intestate domiciled in Paraguay, leaving movables in England. At the time of the intestate's death *A* is, under the law of Paraguay, entitled to succeed to the intestate's property. After the intestate's death the legislature of Paraguay changes the rules as to succession so that, under the changed law of Paraguay, *A* is not entitled to succeed to the intestate's property. After the change of the law in Paraguay, *A* claims in our Courts to succeed to the intestate's movables in England. *A* is entitled to succeed to the movables (*k*).

7. *D*, an Austrian subject domiciled in Austria, is entitled to a fund in Court in this country. He dies in Vienna illegitimate, intestate and without heirs. By Austrian law the property of an Austrian citizen is in such a case confiscated, as property to which there is no heir, by the *fiscus* (Treasury). The fund is claimed by the Austrian Government as *D*'s successor, under the *lex domicilii*. There is no real succession. The Crown is entitled to the fund under English law (*lex situs*) as *bona vacantia* (*l*).

Ch. D. (C. A.) 216. As to legitimation, see Rule 146, p. 521, *ante*. Whether *A* would be entitled to succeed to English chattels real of intestate? See pp. 531, 532, *ante*.

(*h*) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301.

(*i*) See *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266. See chap. xxi., Rule 146, p. 521, *ante*.

(*k*) See *Lynch v. Government of Paraguay* (1871), L. R. 2 P. & D. 268; *In re Aganoor's Trust* (1895), 64 L. J. Ch. 521; and p. 713, *ante*.

(*l*) *In re Barnett's Trusts*, [1902] 1 Ch. 847, especially pp. 856, 857, judgment of Kekewich, J.

(B) *TESTAMENTARY SUCCESSION.*(i) *Validity of Will.*

RULE 194 (*m*).—Any will of movables which is valid according to the law of the testator's domicile at the time of his death is valid (*n*).

Comment.

The general principle which governs testamentary no less than intestate succession is, that the law of the country in which the deceased was domiciled at the time of his death governs the distribution of and the succession to his movables, and therefore decides what constitutes his last will, and whether and how far it is valid; and this without regard to the place either of his birth or of his death, or to the situation of the movables at the time of his death. This principle, which is to a certain extent modified (*o*) when the Courts have to decide how far a will is invalid here on account of grounds of invalidity arising from the law of the testator's domicile, is fully carried out in reference to wills valid by that law. The object of our Courts is to deal with such a will exactly as the Courts of the domicile would deal (*p*) with it at the time of the testator's death (*q*). Hence, on the one hand, if the deceased is a foreigner dying domiciled in England though resident abroad, the will, if it is good according to English law, will be

(*m*) *In re Price*, [1900] 1 Ch. 442, 451, judgment of Stirling, J.; 1 Williams, Executors (11th ed.), pp. 269—283.

Note that Rules 194 to 196, as well as the Exceptions thereto, refer to cases where there has been no change of domicile after the execution of a will. When there has been such change they must be read subject to Rule 197, p. 732, *post*.

(*n*) *I.e.*, of course, in England.

A conceivable exception to this Rule is a bequest, held valid by the law of the testator's domicile, for the promotion in England of some object opposed to the policy of the law of England. Such a bequest would, if it is submitted, be here invalid.

(*o*) See Exceptions 1 and 2, pp. 725, 729, *post*, and Rule 197, p. 732, *post*.

(*p*) See *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431; and compare *In Goods of Dost Aly Khan* (1880), 6 P. D. 6. Compare *Hare v. Nasmyth* (1816), 2 Add. 25; *Moore v. Darell* (1832), 4 Hagg. Ecc. 346; *In Goods of Cosnahan* (1866), L. R. 1 P. & D. 183; *Miller v. James* (1872), L. R. 3 P. & D. 4; *De Bonneval v. De Bonneval* (1838), 1 Curt. 856; *Larpent v. Sindry* (1828), 1 Hagg. Ecc. 382.

(*q*) See *Lynch v. Government of Paraguay* (1871), L. R. 2 P. & D. 268; *In re Aganoor's Trust* (1895), 64 L. J. Ch. 521; and p. 713, *ante*.

held valid here, without reference to the law of the country to which he belongs by nationality or where he is resident; and, on the other hand, if the deceased is a person resident whether in England or abroad, but domiciled in a foreign country, our Courts will hold valid any will of movables good by the law of the country (*e.g.*, France) where the testator is domiciled (*r*).

When once the rights of the parties, under the will of a testator who died domiciled in a foreign country, are determined by the Courts of that country, English tribunals, as elsewhere pointed out (*s*), are bound by and follow the decision of the foreign Court (*t*).

Illustrations.

1. A married woman domiciled in Spain died in 1820, leaving a will of movables situate in England. By the law of Spain she was, and by the law of England she was not, then capable of making a will. The will was held valid in England (*u*).

2. A Frenchman, domiciled in France but resident in England, makes in England a will of movables in the form required by English law. The French Courts hold it valid as being made in accordance with the *lex actus*, or, in other words, in accordance with the forms required by the law of the place of execution. The will is valid (*x*).

3. A Frenchman domiciled in France makes a holograph will of movables valid by the law of France, but not conforming to the provisions of the English Wills Act, and thereby leaves the furniture of his house in England to A. The will is valid.

4. A testator domiciled in Ireland makes a will leaving money in the English funds to A, upon trusts as to accumulation which are prohibited by the Thellusson Act, 1800 (39 & 40 Geo. III.

(*r*) Compare, as to meaning of term "law of a country," Intro., pp. 6, 7, *ante*, and chap. i., pp. 79—82, *ante*.

(*s*) See pp. 469, 470, *ante*.

(*t*) See 1 Williams, Executors (11th ed.), pp. 275—276; *Laneville v. Anderson* (1860), 2 Sw. & Tr. 24; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301; *In re Trufort* (1887), 36 Ch. D. 600.

(*u*) *In Goods of Maraver* (1828), 1 Hagg. Ecc. 498. "So far as respects the "capacity or incapacity of a testator to make a will of personal or movable "property we have already had occasion to consider the subject in another "place. The result of that examination was that the law of the actual domicile "of the party at the time of making his will or testament was to govern as to "that capacity or incapacity." Story, s. 468, and *Lawrence v. Kitteridge* (1852), 21 Conn. 582.

(*x*) See *In Goods of Lacroix* (1877), 2 P. D. 94; p. 734, note (*o*), *post*.

c. 98), which, however, does not extend to Ireland. The will is valid (y).

(ii) *Invalidity of Will.*

RULE 195.—Any will of movables which is invalid according to the law of the testator's domicile at the time of his death on account of—

- (1) the testamentary incapacity of the testator (z), or
- (2) the formal invalidity of the will (i.e., the want of the formalities required by such law (a)), or
- (3) the material invalidity of the will (i.e., on account of its provisions being contrary to such law (b)),

is (subject to the exceptions hereinafter mentioned, and to the effect of Rule 197 (c)) invalid.

Comment and Illustrations.

Testamentary incapacity of testator.

A will executed by a testator who is under an incapacity (e.g., on account of minority) by the law of his domicile, will not be held valid in England. Clause 1 of our Rule is not affected by the Wills Act, 1861 (24 & 25 Vict. c. 114) (d), ss. 1 and 2, and applies as well to aliens as to British subjects (e).

1. Testator is domiciled in a country where the age of majority is 25, and where a minor cannot make a will. He, when resident

(y) See *Freke v. Carbery* (1873), L. R. 16 Eq. 461. Compare *De Fogassieras v. Duport* (1881), 11 L. R. Ir. 123; *In Goods of Gentili* (1875), Ir. Rep. 9 Eq. 541.

(z) *In Goods of Maraver* (1828), 1 Hagg. Eco. 498; Story, s. 465, citing *Lawrence v. Kitteridge*, 21 Conn. 582 (Am.).

(a) 1 Williams, Executors (11th ed.), pp. 269—283; *Craigie v. Lewin* (1843), 3 Curt. 435; *De Zichy Ferraris v. Hertford* (1843), 3 Curt. 468, 486; *Bremer v. Freeman* (1857), 10 Moore, P. C. 306; *Enohin v. Wylie* (1862), 10 H. L. C. 1; 31 L. J. Ch. 402.

(b) *Whicker v. Hume* (1858), 7 H. L. C. 124; 28 L. J. Ch. 396; *Thornton v. Curling* (1824), 8 Sim. 310; *Campbell v. Beaufoy* (1859), Johns. 320. Compare Westlake, ss. 85, 86.

(c) I.e., Rule as to effect of change of domicile after execution of will. See p. 732, *post*.

(d) These sections are reproduced in Exceptions 1 and 2, pp. 725, 729, *post*. But see Rule 197, p. 732, *post*.

(e) *In Goods of Maraver* (1828), 1 Hagg. Ecc. 498; Story, s. 465.

but not domiciled in England, makes a will of movables at the age of 22 and dies. The will is invalid.

2. An Englishman, domiciled in England but living in Virginia, makes a will when 19 years of age and dies. The will, though valid by the law of Virginia, is invalid here, on the ground that an infant is incapable of making a will (*f*).

Formal invalidity of will.

A will, though made by a person capable of making it, may nevertheless be invalid for want of some formal requisite—*e.g.*, signature by the testator, attestation by the required number of witnesses, and so forth. It may, in short, be defective for want (to use the terms of English law) of due execution. Such a defect constitutes a formal invalidity.

The question whether a will is duly executed, or, in other words, whether it is or is not formally valid, must be determined in accordance with the law of the testator's domicile. In cases, in short, of testamentary disposition, as in cases of intestate succession, the rule of our Courts (though subject now, as regards formal validity, to considerable exceptions (*g*)) is to look to the law of the testator's domicile. This, it should carefully be noted, is still the rule. It applies to all wills, whether of British subjects or of aliens, which, for whatever reason, do not fall within the exceptions to Rule 195 (*h*).

1. An American citizen domiciled at New York, but resident in England, makes his will while in England, according to the formalities required by the English Wills Act. The will is invalid, according to the law of New York, for want of publication (*i*). His will is invalid.

2. An American citizen, domiciled at New York, executes when in France a holograph will, valid by the law of France, but not attested as required by the law of New York. He leaves movable property in England. His will is invalid.

3. A British subject born in the Mauritius, but whose parents were at the time of his birth domiciled in France, comes to

(*f*) Revised Code of Virginia, 224, cited 4 Kent (12th ed.), p. 506, note (e).

(*g*) See Exceptions 1 and 2, pp. 725, 729, *post*.

(*h*) See, *e.g.*, *In Goods of Lacroix* (1877), 2 P. D. 94; but note that the "law of the testator's domicile" means, as already explained (see p. 81, note (*x*), and p. 713, *ante*), the law or rule applicable to the particular case.

(*i*) See 4 Kent (12th ed.), p. 515, note (b).

England and acquires an English domicile. He, whilst in London, executes a will of movables in England according to the forms required by the law of Mauritius, but not according to the English Wills Act. The will is invalid (*k*).

4. A naturalized British subject is resident in England, but his domicile of origin is in one of the United States. He retains his American domicile, and whilst on a visit to the Continent makes a will, which is executed in accordance with the formalities required by the English Wills Act, but not in accordance with the formalities required either by the law of the testator's domicile or by the law of the country where the will is made. The will is invalid (*l*).

Material invalidity.

A will made by a person under no testamentary incapacity (*m*) and duly executed or formally valid (*m*) may nevertheless be invalid, or wholly or in part inoperative, because it contains provisions to which the law will not give effect. Thus, English law prohibits bequests upon trust for accumulation beyond certain periods (*n*); the law of France (*o*), as of Scotland (*p*), invalidates bequests of more than a certain proportion of the testator's property in derogation of the rights of his widow or children; the law of Louisiana makes void a bequest for charitable purposes to an unincorporated body of persons (*q*). Such invalidity, arising from the nature of the bequest, is termed *material* or *intrinsic* invalidity, and whether a will is or is not void wholly or in part on account of such material or intrinsic invalidity depends upon the law of the country where the testator is domiciled. Thus, where a British subject domiciled in France made a disposition of his

(*k*) Remark that this will does not come within Exception 1, p. 725, *post*, nor within Exception 2, p. 729, *post*.

(*l*) Such a will, being invalid by the law of the testator's domicile, falls within Rule 195, p. 721, *ante*, and does not fall within either of the Exceptions to it. See App., Note 21, "The Wills Act, 1861." See, as further illustration, *In Goods of Gatti* (1879), 27 W. R. 323; and contrast *In re Gally* (1876), 1 P. D. 438.

(*m*) See p. 721, *ante*.

(*n*) The Thellusson Act (39 & 40 Geo. III. c. 98).

(*o*) See *Thornton v. Curling* (1824), 8 Sim. 310.

(*p*) Conf. Bell, *Principles of Law of Scotland* (11th ed.), ss. 1579, 1582, 1592.

(*q*) *Macdonald v. Macdonald* (1872), L. R. 14 Eq. 60. See Scottish case, *Boe v. Anderson* (1862), 24 D. 732.

movable property which, though valid by the law of England, was invalid by the law of France, the will was held inoperative (*r*).

Nor is the effect of the material invalidity of a will affected, at any rate where there is no change of domicile, by the Wills Act, 1861 (24 & 25 Vict. c. 114) (*s*). That Act renders formally valid, and therefore admissible to probate, a will which might otherwise be bad for defects of form; but even when a will has been admitted to probate in solemn form, and therefore must be held not defective as to its formal requisites, it is, in so far as its provisions contravene the law of the testator's domicile, treated here as inoperative, and the persons obtaining probate will be held by the Courts to be trustees for those who would be entitled to succeed to deceased's property if (as far as the inoperative provisions go) he had died intestate.

Where a will was admitted to probate in solemn form, but there was a doubt whether the provisions were valid according to the testator's *lex domicilii*, the law was thus laid down:—

“A probate is conclusive evidence that the instrument proved “was testamentary according to the law of this country. But it “proves nothing else. That may be illustrated in this way: “Suppose there was a country in which the form of a will was “exactly similar to that in this country, but in which no person “could give away more than half his property. Such an instru- “ment made in that country by a person there domiciled, when “brought to probate here, would be admitted to probate as a “matter of course. Probate would be conclusive that it was testa- “mentary, but it would be conclusive of nothing more; for after “that there would arise the question, how is the Court that is to “administer the property to ascertain who is entitled to it? For “that purpose you must look beyond the probate to know in what “country the testator was domiciled, for by the law of that “country the property must be administered. Therefore, if the “testator, in the case I have supposed, had given away all his “property, consisting of 10,000*l.*, it would be the duty of the “Court that had to construe the will to say 5,000*l.* only can go “according to the direction in the will; the other 5,000*l.* must go “in some other channel” (*t*).

(*r*) *Thornton v. Curling* (1824), 8 Sim. 310; *Campbell v. Beaufoy* (1859), Johnson, 320. See *Whicker v. Hume* (1858), 7 H. L. C. 124, 156, 157.

These cases were no doubt decided in reference to the law as it stood before 1861, but (at any rate when there is no change of domicile) the Wills Act, 1861, does not, it is submitted, affect the matter.

(*s*) See Rule 197, p. 732, *post*, and App., Note 21, “The Wills Act, 1861.”

(*t*) *Whicker v. Hume* (1858), 7 H. L. C. 124, 156, 157, judgment of Cranworth, C. Conf. judgment of Lord Wensleydale, *ibid.*, 165, 166.

1. *T*, domiciled in England, but resident in France, makes a will leaving his movable property to trustees upon trusts for accumulation beyond the period allowed by the Thellusson Act. The will, in whatever form it is made, is as regards such trusts invalid (*u*).

2. *T*, domiciled in France, makes a will while in England containing provisions in contravention of French law. The will is made in the form required by French law. It is here, as regards such provisions, inoperative and invalid (*x*).

3. *T* dies domiciled in England. He bequeaths "unto the 'Priests of the Society of Jesus, [domiciled] at Richmond, Victoria, 2,000*l.* sterling, to be spent in masses for the soul of 'my late wife." The legacy is void under the law of England (*lex domicilii*) as a gift to a superstitious use; it is valid under the law of Victoria. The will is, so far as the legacy is concerned, invalid (*y*).

Exception 1 (z).—Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate (*a*), be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either

[1] by the law of the place where the same was made (*b*), or

(*u*) *Freke v. Carbery* (1873), L. R. 16 Eq. 461.

(*x*) *Thornton v. Curling* (1824), 8 Sim. 310.

(*y*) A legacy by a testator domiciled in England, void by the law of England, is invalid though given to persons not domiciled in England. *In re Elliott, Elliott v. Johnson* (1891), 39 W. R. 297, judgment of North, J. The view acted upon in this case that legacies for masses are void by English law has been rejected by the House of Lords in *Bourne v. Keane*, [1919] A. C. 815.

(*z*) The Wills Act, 1861 (24. & 25 Vict. c. 114), s. 1. See App., Note 21, "The Wills Act, 1861."

(*a*) See *In re Grassi*, [1905] 1 Ch. 584; *In re Lyne's Settlement Trusts*, [1919] 1 Ch. (C. A.) 80.

(*b*) See for a curious application, *Lyne v. De la Ferté* (1910), 102 L. T. 143, in which a holograph will made in France in a form valid by French law by a

- [2] by the law of the place where such person was domiciled when the same was made, or
 [3] by the laws then in force in that part [if any] (c) of His Majesty's dominions where he had his domicile of origin.

Comment.

This Exception is (except the figures and words in square brackets) given in the terms of the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 1; the words "if any," suggested by *In Goods of Lacroix* (d), are added for the sake of clearness.

It will, however, be observed that part of the Exception (e) refers to cases in which there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not, strictly speaking, within an Exception to Rule 195. The effect of a change of domicile (f) is considered in the comment upon Rule 197.

A will to come within this Exception must be, first, a will "made out of the United Kingdom" (g) (e.g., in Guernsey or in France); secondly, a will "made by a British subject," who may be either a natural-born or a naturalized (h) British subject, but must be a British subject at the time when the will is executed (i); thirdly, a will of "personal estate." The term "personal estate" is used in its strict technical sense, and includes all interests in English land (e.g., leaseholds) which come within the description of personal estate (k), though such interests are not movables (l).

testator domiciled in England is admitted to probate, though it deals with leaseholds and is wrongly dated, while French law regards the date as an essential feature.

(c) See *In Goods of Lacroix* (1877), 2 P. D. 94. The expression "His Majesty's dominions" is of course equivalent to "British dominions" as defined p. 68, *ante*.

(d) (1877), 2 P. D. 94. Contrast *In Goods of Gatti* (1879), 27 W. R. 323.

(e) Viz., the words in the parenthesis and clause 2.

(f) See, especially, p. 733, note (l), *post*.

(g) For meaning of "United Kingdom," see p. 68, *ante*.

(h) *In Goods of Gally* (1876), 1 P. D. 438.

(i) *In Goods of Von Buseck* (1881), 6 P. D. 211; *Bloxam v. Favre* (1883), 8 P. D. 101, 105, judgment of Hannen, Pres., and (1884), 9 P. D. (C. A.) 130.

(k) *In re Grassi*, [1905] 1 Ch. 584; *Carlton v. Carlton* (1887), 35 W. R. 711.

(l) See pp. 75—77, *ante*. An interest in lands held by trustees under a marriage settlement with power of sale is personal property. *In re Lyne's Settlement Trusts*, [1919] 1 Ch. (C. A.) 80, 91, 92.

When the above three conditions are fulfilled, a will (though not executed according to the form required by the law of the testator's domicile at the time of his death) will be held to be "well executed for the purpose of being admitted to probate" (*i.e.*, will be held formally valid), if executed according to any of the forms specified in the Exception.

As the Wills Act, 1861 (24 & 25 Vict. c. 114), does not invalidate (*m*) a will made in any form which would be valid independently of the Act, a British subject can still make a valid will of movables by following the form required by the law of his actual domicile. Hence it may happen that a British subject possibly has, when residing out of the United Kingdom, a choice of three (*n*) different forms, according to any one of which he may make a will of movables which will be held, as far as form goes, valid in England. Thus, a British subject is domiciled in Germany. At the moment of making his will he is travelling in Italy. He is the son of Canadian parents and has a domicile of origin in Nova Scotia. He may make a valid will of movables in any one of three different forms, viz., the German form (*lex domicilii*), the Italian form (*lex actus*), the Nova Scotian form (*lex domicilii originis*).

If, however, the testator is a *naturalized* British subject, his will, if made only in accordance with the form required by the law of the place where he has his domicile of origin, may very well turn out to be invalid. The testator, for example, is a Frenchman whose domicile of origin is French. He becomes a British subject by naturalization. He is domiciled in Massachusetts and is resident in New York, where he makes his will in accordance with the forms required by the law of the place where he has his domicile of origin (*viz.*, France), but not in accordance with the forms required by the law of New York. The will is invalid. It is not made according to the forms required by the law of the country where the testator is domiciled, *viz.*, Massachusetts. It is not made according to the forms required by the law of the place where it is made, *viz.*, New York. It is made

(*m*) "Nothing in this Act contained shall invalidate any will or other testamentary instrument, as regards personal estate, which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act." The Wills Act, 1861, s. 4.

(*n*) If there has been a change of domicile, he has in effect a choice of four different forms. See p. 719, note (*m*), *ante*; and Rule 197, p. 732, *post*.

according to the forms required by the law of the place where the testator has his domicile of origin (viz., France), but this place is not "part of His Majesty's dominions."

If, indeed, the law of Massachusetts held such a will valid when made by a British subject (*o*), the will might be good as being made in accordance with the testator's *lex domicilii*, but it may pretty confidently be assumed that the Courts of Massachusetts would not hold the will valid, and therefore that it would neither under Rule 194 nor under Exception 1 be held valid in England.

Illustrations.

1. *T*, a British subject domiciled in England, goes for a few hours to Boulogne. While there he executes a will of all his personal property, including English leaseholds, in accordance with the forms required by the law of France, but not in accordance with the forms required by the Wills Act, 1837. The will is valid.

2. The circumstances are the same as in Illustration 1, except that *T* executes a will of all his real and personal property. The will is, as regards the real property, invalid, but as regards the personal property, valid (*p*).

3. *T*, a British subject, is the son of Canadian parents and has a domicile of origin in Nova Scotia. He is travelling in Italy. He is domiciled in Denmark. He makes a will of all his movable property in accordance with the form required either (a) by the law of Denmark (*lex domicilii*), or (b) by the law of Italy (*lex actus*), or (c) by the law of Nova Scotia (*lex domicilii originis*). The will is valid.

4. *T* is a Frenchman whose domicile of origin is French. He has become a British subject by naturalization. He is domiciled in Massachusetts. He makes a holograph will in accordance with the forms required by the law of France (*lex domicilii originis*), but not in accordance with the forms required by the law of Massachusetts, where he is domiciled. The will is invalid.

5. *T*, an Englishwoman, was a natural-born British subject and at her birth domiciled in England. She marries a German subject and thereby becomes an alien. After her marriage *T* executes a

(*o*) See *In Goods of Lacroix* (1877), 2 P. D. 94, where a will made by a Frenchman naturalized in England but domiciled in France was, though made in the English form, held valid on the ground that the French Courts held such a will good in the case of a British subject.

(*p*) Compare p. 726, *ante*.

will of movables executed in accordance with the forms required by English law (*lex domicilii originis*), but not in accordance with the forms required by German law. The will is invalid (*q*).

Exception 2 (r).—Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Comment.

This Exception reproduces verbatim the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 2. It will be noticed that the words in parenthesis refer to cases where there may have been a change of domicile between the execution of the will and the death of the testator, and therefore are not, strictly speaking, within an Exception to Rule 195. The effect of the terms referring to a change of domicile is considered in the comment upon Rule 197.

A will to come within this Exception must be: first, a will "made within the United Kingdom"; secondly, a will made by a "British subject," who may be either a natural-born or a naturalized British subject, but must be a British subject at the time when the will is executed (*s*); thirdly, a will of "personal estate" in the strict sense of that term (*t*). If these conditions are satisfied, a will (though not duly executed according to the law of the testator's domicile) will be held to be well executed, and will

(*q*) *Bloxam v. Favre* (1884), 9 P. D. (C. A.) 130. *T* at the time of executing the will was an alien, and therefore the will does not come within Exception 1.

(*r*) 24 & 25 Vict. c. 114, s. 2. See App., Note 21, "The Wills Act, 1861"; note that "United Kingdom" does not include the Isle of Man or the Channel Islands, see p. 68, *ante*. On the forms of wills recognized in Scotland, see *Munro v. Coutts* (1813), 1 Dow 437; *Scott v. Scales* (1864), 2 M. 613; *Hamilton v. Whyte* (1882), 9 R. (H. L.) 53.

(*s*) Compare p. 726, note (*i*), *ante*.

(*t*) See p. 726, *ante*.

be admitted to probate (*i.e.*, will be held formally valid) if executed "according to the forms required by the laws for the "time being in force in that part of the United Kingdom where "the same is made." Thus, a British subject may, when within the United Kingdom, make a will of movables which is to be held duly executed if he makes it either according to the form required by the law of the country where he is domiciled (*e.g.*, Mauritius) or according to the form required by the law of the country where the will is made, *e.g.*, Scotland.

A will, it should be noticed, which falls within either Exception 1 or Exception 2, though it must be held by an English Court to be duly executed or free from any formal defect, may still, as before the Act of 1861, be invalid; either because the testator is, according to the law of his domicile, incapable (*u*) of making a will, or because the will is materially invalid or inoperative as containing provisions contravening the law of the testator's domicile.

SUB-RULE.—The law of a deceased person's domicile at the time of his death, in general, determines whether, as to his movables, he does or does not die intestate.

Comment.

This Sub-Rule is an immediate result of the principle that the validity of a will (*x*) is in general determined by the law of a testator's domicile. A French citizen dies domiciled in England, leaving an unattested testamentary document, written wholly in his own hand and signed by himself. At the moment of executing it he is resident in Paris; he leaves no other will. Our Courts will decide, looking wholly to ordinary English law, that the document is not a will, *i.e.*, that the deceased has died intestate. If, on the other hand, the testator had died in England but domiciled in France, and the document had been executed in England, our Courts would, in deciding whether it constituted a will or not, have looked wholly to French law. In either case, therefore, whether the testator does or does not leave a valid will, or, in other words, whether he does or does not die intestate, is determined by our Courts in accordance with the law of the deceased's domicile.

(*u*) See Rule 195, p. 721, *ante*.

(*x*) See Rule 194, p. 719, *ante*, and Rule 195, p. 721, *ante*; and compare Rule 193, p. 716, *ante*.

The effect, however, of Exceptions 1 and 2 to Rule 195 (*y*), and of Rule 197 (*z*), or, in other words, of the Wills Act, 1861 (24 & 25 Vict. c. 114), occasionally is that wills are held valid by our Courts though not made in accordance with the testator's *lex domicilii*, or, in other words, that a deceased person is held by English Courts to have died testate who, according to the law of his domicile at the time of his death, has died intestate.

(iii) *Interpretation of Will.*

RULE 196. — Subject to the exception hereinafter mentioned, a will of movables is (in general) to be interpreted with reference to the law of the testator's domicile at the time when the will is made.

Comment.

This Rule bears upon two different cases:—

First. Where the testator uses technical terms of law, which have a definite meaning attached to them by the law of his domicile, his will must be interpreted with reference to such law.

Secondly. Where he has used terms the meaning of which is not governed by a rule of law, such as names of measures, weights, money, &c., it is reasonable to presume (*a*), in the absence of ground to the contrary, that he meant the measures, weights, &c., known by these names in the country where he was domiciled.

Except, however, in the cases in which the construction of a will is governed by an absolute rule of law, the maxim, that the terms of a will should be construed with reference to the law of the testator's domicile, is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country (*b*).

(*y*) See pp. 725, 729, *ante*.

(*z*) See p. 732, *post*.

(*a*) See Intro., General Principle No. VI., pp. 60, 61, *ante*; *Campbell v. Sandford* (1834), 2 Cl. & F. 450; *Campbell v. Campbell* (1866), L. R. 1 Eq. 383; *In re Fergusson's Will*, [1902] 1 Ch. 483; *Baring v. Ashburton* (1886), 54 L. T. 463.

(*b*) *In re Price*, [1900] 1 Ch. 442, 452, 453, judgment of Stirling, J.; *In re D'Este's Settlement*, [1903] 1 Ch. 898, 900, judgment of Buckley, J.; *In re Scholefield*, [1905] 2 Ch. 408; *In re Simpson*, [1916] 1 Ch. 502; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620; Rule 201, p. 754, *post*.

See as to the non-effect of change of domicile after execution of will, Rule 197, p. 732, *post*.

Exception.—Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country.

Comment.

There are at least two different cases to which the principle of this Exception applies (*c*):

First. When a will is expressed in the technical terms of the country where it is executed, the presumption is that the testator had reference to the law of the place of execution, and the will, therefore, should be construed with reference to that law. Thus, a testator domiciled in England, but living in France, executes a will there in French, which is expressed in all the technical terms of French law. Such a will ought, it is conceived, to be interpreted with reference to French law.

Secondly. When a will is expressed in the technical terms of the country where it is to be carried into effect, the presumption again is that the testator had reference to the law of the country where the will was to be carried into effect, and the will, therefore, should be construed with reference to that law (*d*).

Thus, an Englishman domiciled in France executes a will there, leaving his money on English trusts to be executed in England. The will is expressed in the technical terms of English law. There cannot, it is conceived, be a doubt that the will must be interpreted with reference to English law.

(iv) *Effect of Change of Testator's Domicil after Execution of Will.*

RULE 197.—[Subject to the possible exception herein-after mentioned] no will or other testamentary instrument [whether executed by a British subject or by an alien (*e*)] shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason

(*c*) Compare 1 McLaren, *Law of Wills and Succession*, ss. 63—70; *Bradford v. Young* (1885), 29 Ch. D. (C. A.) 617. Contrast *Anstruther v. Chalmers* (1826), 2 Sim. 1, where the interpretation followed the law of domicil, not that of the country where, and in the technical language of which, the will was made.

(*d*) Compare *In re Miller*, [1914] 1 Ch. 511.

(*e*) This view is confirmed: *Re Groos*, [1904] P. 269.

of any subsequent change of domicile of the person making the same (*f*).

Comment.

A testator may execute his will when domiciled in France, and may die when domiciled in England. If this is so, the question arises whether the validity of the will depends on the law of France or on the law of England. It is to a case of this kind that Rule 197 applies.

This Rule, if we omit the words in brackets, reproduces verbatim the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3 (*g*); with this Rule should be read the two Exceptions to Rule 195 (*h*) whereof Exception 1 (*i*) reproduces the Wills Act, 1861, s. 1, and Exception 2 (*k*) reproduces the Wills Act, 1861, s. 2. Our Rule, taken together with that part of these Exceptions which refers to a change of domicile, embodies an alteration in the law with respect to the effect on the validity of a will of a change in the testator's domicile after the execution of the will (*l*).

(*f*) Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3.

(*g*) See App., Note 21, "The Wills Act, 1861."

(*h*) See p. 721, *ante*.

(*i*) See p. 725, *ante*.

(*k*) See p. 729, *ante*.

(*l*) It is difficult to understand the precise relation in this matter between sects. 1 and 2, on the one hand, and sect. 3, on the other, of the Wills Act, 1861. Sect. 1 and sect. 2 each provide that a will of a British subject which comes within the terms of the section shall, as regards personal estate, be held to be well executed "whatever may be the domicile of such person at the time of making the same, or at the time of his or her death"; whilst sect. 3 specifically provides that a will shall be held to be well executed "if the same be made according to the forms required . . . by the law of the place where such person was domiciled when the same was made." When it is remembered that a will of movables, independently of the Act, is valid if made in accordance with the forms required by the law of the place where the testator is domiciled at the time of his death (compare the Wills Act, 1861, s. 4), it seems to follow that a will of movables made by a British subject is prevented, by sects. 1 and 2 of the Wills Act, 1861, from being rendered invalid by change in the testator's domicile. But sect. 3 enacts that no will shall become invalid by reason of any subsequent change of domicile of the person making the same. The result, then, in respect to the will of a British subject would on the whole appear to be that, as regards the effect to be attributed to a change in the testator's domicile after the execution of his will, sect. 3 overlaps, so to speak, sects. 1 and 2, or, in other words, that the law would, as regards the will of such British subject, be unaltered, were the provisions in sects. 1 and 2, which have regard to a change of domicile, omitted. (See App., Note 21, "The Wills Act, 1861.") But sects 1 and 2 apply only to a will made by a British subject, whereas sect. 3 applies to a will made by an alien (*Re Groos*, [1904] P. 269), and sects. 1 and 2 deal with form only.

Up to 1861 our Courts probably held (m) (as appears still to be maintained by the Courts of those parts of the United States where the English common law prevails (n)) that a will invalid in point of form by the law of the country where the testator dies domiciled is to be held invalid, even though perfectly valid according to the law of the country where the will was executed. Thus, if a testator, while domiciled in France, made a holograph will in the form allowed by the law of France, but not duly executed according to the English Wills Act, and afterwards died domiciled in England, his will was, before 1861, held invalid here (o). The enactment (the Wills Act, 1861, s. 3) embodied in Rule 197 was passed to remedy the inconveniences or remove the doubts arising from this state of the law.

As the Wills Act, 1861 (24 & 25 Vict. c. 114), applies to all wills made by persons who die after 6th August, 1861, and as the third section of the Act applies to the wills both of aliens and of British subjects, a will made by a person capable of making it by the law of his domicile at the time of its execution, and made in the form required by such law, will not now be treated by any English Court as invalid, either because the testator was under a testamentary incapacity by the law of the country where he died domiciled (in which case the law seems to have been the same before the Act as it is now), or because the will is not made in the form required by the law of such country.

It is also clear that all questions of interpretation must be dealt with exactly as they would have been dealt with had the testator not changed his domicile.

(m) The law before 1861 as to the effect of a change of domicile on the validity of a will was not free from doubt. Compare Story, s. 479 g, and Westlake (1st ed.), s. 326; *Stanley v. Bernes* (1831), 3 Hagg. Ecc. 373, 447; *Croker v. Marquis of Hertford* (1844), 3 Moore, P. C. 339; *Page v. Donovan* (1857), Deane, 278.

(n) See Story, s. 479 g, citing *Nat v. Coon*, 10 Miss. 543. See *Dupuy v. Wurtz*, 53 N. Y. 556; *Moultrie v. Hunt*, 23 N. Y. 394. Compare Wharton (3rd ed.), ss. 570, 571.

(o) In the case of an Englishman making his will in England and dying domiciled in France, inconvenience would not arise, since Continental Courts maintain the principle *locus regit actum*, or, as applied to the present case, that a will is formally valid if made according to the forms required by the law of the place of execution. *Crookenden v. Fuller* (1859), 1 Sw. & Tr. 441.

In 1857, however, the Privy Council held in *Bremer v. Freeman*, 10 Moore, P. C. 306, that the will in English form of a testator domiciled in France was invalid by French, and therefore by English law, and the Act of 1861 was passed partly in order to obviate the inconvenience of this result. *Hamilton v. Dallas* (1875), 1 Ch. D. 257.

First Question.—Can a will, which is invalid by the law of the testator's domicile at the time of its execution, be rendered valid by his subsequent change of domicile?

As we are concerned only with the rules of law applied by English Courts, the question raised is, whether our Courts will or will not, under all circumstances, hold a will invalid because it was invalid by the law of the testator's domicile at the time of its execution? This inquiry can arise only on the supposition that the will, though invalid by the law of the testator's domicile at the time of its execution, would (but for the possible effect of that law) be valid by the law of the testator's domicile at the time of his death. We must further suppose that the will is not one which, being executed after 6th August, 1861, by a British subject, is made in one of the forms allowed by the Wills Act, 1861, ss. 1 and 2, or, in other words, which comes within either of the Exceptions to Rule 195.

In these circumstances the answer to the inquiry is in no way affected by the Wills Act, 1861 (24 & 25 Vict. c. 114), s. 3, and is probably different according as the testator dies domiciled in England or in a foreign country.

First. Where the testator, having made his will in another country, dies domiciled in England, the view our Courts will take of the will depends, it is conceived, on the cause of its invalidity under the law of the testator's domicile at the time of execution.

The *capacity* of a testator to make a will should perhaps be determined by the law of his domicile at the time the will is made. "The law of the actual domicile of the party at the time of the "making of his will or testament [is]," it has been laid down on high authority, "to govern as to that capacity or incapacity" (*p*). Hence, if the testator is incapable of making a will by the law of his domicile at the time of its execution, his will may, it would seem, be invalid at the time of his death.

(*p*) Story, s. 465, approved by Phillimore, s. 863. See, however, *contra*, Westlake, s. 86. "Either the old or the new rule [*i.e.*, Lord Kingsdown's Act, "s. 3] is not limited to the forms of execution, but extends to every circumstance "on which the validity of a will may depend except, it is presumed, the "testator's capacity which even under the new rule should certainly continue to "be determined by his personal law at the time of his death." Compare Savigny, s. 377, p. 282; *Bremer v. Freeman* (1857), 10 Moore, P. C. 306, 359, as to the old rule, under which the domicile at death is treated as alone of importance, but capacity is not specially referred to; *Lowrie v. Bradley*, 39 Am. Dec. 142, where the rule is equally general, but without special allusion to capacity; Wharton (3rd ed.), s. 585.

The *form* of a will is perhaps to be determined by the law of the testator's domicile at the time of his death (*q*). If, therefore, the will was invalid only for want of the form required by the law of the testator's domicile at the time of its execution, the will might perhaps, under the circumstances supposed, be held valid.

The *material* or intrinsic validity of a will depends on the law of the testator's domicile at the time of his death (*r*).

If, therefore, the will was invalid or inoperative, according to the law of the testator's domicile, at *the time of its execution*, on account of its *material invalidity*, *i.e.*, on account of its provisions, but the provisions of the will are not opposed to the law of the testator's domicile at the *time of his death*, the will is valid.

Secondly. Where the testator, having made his will, then, after a change of domicile, dies domiciled in a foreign country, the effect of a change of domicile in making the will valid will depend wholly on the law of the country where the testator dies. If on any ground the will is good by the law of his last domicile (*e.g.*, France), it will be treated as valid in England.

Second Question.—When a testator or testatrix, having made a will, subsequently changes his or her domicile, and also whether before or after such change of domicile marries, what is the law by which to determine whether the marriage operates as a revocation of the will?

This inquiry is raised by the fact that under the law of some countries (*e.g.*, England) a marriage *ipso facto* revokes any will made before marriage by either party to the marriage, whilst

(*q*) *I.e.*, where, as in the case under consideration, 24 & 25 Vict. c. 114, does not apply. See *Bremer v. Freeman* (1857), 10 Moore, P. C. 306, 359; Story, s. 473. Contrast *In Goods of Stoddart* (1862), 31 L. J. P. & M. 195, which is (*semble*) wrongly decided.

(*r*) "There is a universal agreement in referring to the law of the domicile at "death, as opposed to that of the domicile when the will was made, all questions "of its intrinsic validity; as of the proportion of his estate of which the testator "may dispose, legitim, disherison of natural heirs by simple preterition, and "so forth." Westlake (1st ed.), s. 328, p. 310. These words are cited from the first edition of Westlake, *Private International Law*, published in 1859. They do not recur in his later editions; but see Westlake (5th ed.), s. 122. They express, however, a sound principle, and are supported by *In re Groos, Groos v. Groos*, [1915] 1 Ch. 572, where it was held that the change of a testator's domicile from Dutch to English after the execution of a will extended her testamentary power by removing the limitation imposed on it under Dutch law. The construction of the will is not altered, but the property affected is increased in amount. Compare *In re Bridger*, [1894] 1 Ch. 297, *per* Lindley, L. J.; *In re Groos*, [1915] 1 Ch. 577.

under the law of other countries (*e.g.*, Scotland or France) marriage does not revoke a will made before marriage either by the husband or the wife. When, therefore, to take one example only, *H* makes a will whilst domiciled in England, and afterwards acquires a Scottish domicile and marries *W*, an Englishwoman, it is clearly necessary to determine on his death whether the validity of his will is to be determined by the law of England, where he was domiciled when he made it, or by the law of Scotland; where he is domiciled at his death. If its validity depends upon the law of England, it has been revoked by his marriage. If its validity depends upon the law of Scotland, it remains in force at the time of his death. The answer to our question, both in this and in every other case that can arise, is that English Courts determine the effect of marriage as the revocation of a will of movables or immovables (*s*) made before marriage by the law of the country where the testator or the testatrix is domiciled at the moment of the marriage (*t*). In order fully to appreciate the effect of the rule upheld by our Courts, it must be remembered that the domicile of a wife becomes, at the moment of marriage, the same as the domicile of her husband. English Courts therefore, in effect, hold that the question whether or not a marriage operates as the revocation of a will which has been made by either husband or wife before marriage, must be determined in accordance with the law of the country where he is domiciled at the moment of the marriage. Thus, if he is then domiciled in England, the marriage revokes any will already made, either by himself or by his wife, and it is not rendered valid by his afterwards acquiring a Scottish domicile. If at the moment of the marriage he is domiciled in Scotland, neither his nor his wife's will is revoked by the marriage, even though at the time of his death they have acquired an English domicile. Nor is the principle adopted by our Courts inconsistent (*u*) with Rule 197, or in other words, with the Wills Act, 1861, s. 3.

(*s*) See Wills Act, 1837, s. 18, and 1 Steph. Comm. (14th ed.), p. 362.

(*t*) *In Goods of Reid* (1866), L. R. 1 P. & D. 74; *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211; *Re Groos*, [1904] P. 269; *Westerman v. Schwab* (1905), 13 Sc. L. T. 594; (1905), 43 Sc. L. R. 161.

(*u*) "The rule of English law which makes a woman's will null and void on "her marriage is part of the matrimonial law, and not of the testamentary law." *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 240, judgment of Vaughan Williams, L. J.

Illustrations.

1. A testator, when domiciled in France, makes a holograph will of movables valid by the law of France, but not attested by the witnesses required by the English Wills Act. He afterwards becomes domiciled in England and dies there. The will is valid (*x*).

2. An Englishman is domiciled in a country where minority ends at 25, and minors are under a testamentary incapacity. He makes a will of movables at the age of 22, and after he has attained the age of 25 acquires a domicile and dies in England. His will would (perhaps) be held invalid in England (?).

3. An alien when domiciled in a foreign country executes in England a will of movables according to the forms required by the law of England, but not in accordance with the forms required by the law of his domicile. He afterwards becomes domiciled and dies in England. The will is possibly valid (?) (*y*).

4. A Frenchman domiciled in France makes a will bequeathing his movable property in a way prohibited by the law of France, but not prohibited by the law of England. He becomes domiciled and dies in England. The will (*seem*) is valid.

5. *T*, a man domiciled in Scotland, makes a will of movables there and then marries. After his marriage he becomes and dies domiciled in England. His will is valid (*z*), *i.e.*, is not revoked by the marriage.

6. *T*, a man domiciled in England, makes a will of movables there and then marries. After his marriage he becomes and dies domiciled in Scotland. His will is invalid, *i.e.*, is revoked by the marriage (*a*).

7. *T*, a man domiciled in Scotland, makes a will of movables there. *T*, after making his will, acquires a domicile in England, and whilst domiciled in England marries. *T* afterwards resumes his Scottish domicile and dies domiciled in Scotland. His will (*seem*) is invalid (*b*).

(*x*) Rule 197, p. 732, *ante*. See the Wills Act, 1861, s. 3.

(*y*) See p. 736, *ante*. Contrast *In Goods of Stoddart* (1862), 31 L. J. P. & M: 195.

(*z*) *In Goods of Reid* (1866), L. R. 1 P. & D. 74. The reader should bear in mind that under the law of England marriage does revoke, whilst under the law of Scotland it does not revoke, a will made before marriage.

(*a*) Compare *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211.

(*b*) *I.e.*, the marriage of *T*, a person domiciled in England, is by the law of his then domicile revoked, and is not re-validated by his resumption of a Scottish domicile.

8. *T*, an unmarried Scotswoman, makes a will of movables valid by the law of Scotland. She resides for some years without becoming domiciled in England. She then marries *H*, a Scotsman, of whom it is doubtful whether he is domiciled in England or not. She continues resident in England till her death. If *H* was at the time of the marriage domiciled in Scotland the will is valid; if he was then domiciled in England the will is revoked, *i.e.*, is invalid (*c*).

9. *T*, an unmarried Scotswoman domiciled in Scotland, makes a will of movables. She then marries a Scotsman domiciled in Scotland. Her husband, after the marriage, acquires an English domicile and the testatrix thereby becomes and remains domiciled in England until her death. Her will is valid (*d*).

10. *T*, an unmarried Englishwoman, makes a will of movables whilst domiciled in England. She afterwards marries in England a Scotsman domiciled in Scotland. She dies domiciled in Scotland. Her will is valid (*e*).

Exception.—A will which is invalid on account of material invalidity according to the law of the testator's domicile at the time of his death is invalid, although it may have been valid according to the law of the testator's domicile at the time of its execution.

Comment.

This Exception is open to some doubt, as it depends upon the interpretation to be put upon 24 & 25 Vict. c. 114, s. 3 (*f*). The words of that section are very strong, and may be taken to mean that a will which would have been operative if the testator had

(*c*) *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211.

(*d*) *Re Groos*, [1904] P. 289.

(*e*) *I.e.*, is not revoked by the marriage. *Westerman v. Schwab* (1905), 13 Sc. L. T. 594; (1905), 43 Sc. L. R. 161. This result is logically justifiable. The testatrix at the moment of her marriage is domiciled in Scotland. Her will was at no assignable moment of time invalid by the law of her domicile. As long as she remained domiciled in England her will was valid, for she was unmarried. From the moment she married the will was also valid, for from the moment of marriage she was domiciled in Scotland.

(*f*) "No will or other testamentary instrument shall be held to have been "revoked or to have become invalid, nor shall the construction thereof be altered "by reason of any subsequent change of domicile of the person making the same." The Wills Act, 1861, s. 3. See App., Note 21, "The Wills Act, 1861."

died domiciled in the country where the will was executed shall not be rendered invalid or inoperative by any subsequent change of domicile; but probably the Act does not refer to material invalidity, and a will which is wholly or in part invalid or inoperative on account of its provisions being opposed to the law of the testator's domicile at the time of death will, since as before the Act, be in so far invalid or inoperative.

Illustration.

T, when domiciled in Ireland, executes a will bequeathing money in the funds on trusts for accumulation in excess of the periods permitted by the Thellusson Act (*g*). This statute does not extend to Ireland, and the bequest would be valid should *T* die domiciled in Ireland. *T*, however, after the execution of his will, dies domiciled in England. Whether the will as to this bequest is or is not invalid in so far as the permitted periods are exceeded?

(C) EXERCISE OF POWER BY WILL (*h*).

(i) Capacity.

RULE 198.—A person may have capacity to exercise by will a power of appointment conferred by an English instrument, although he does not possess testamentary capacity under the law of his domicile.

(*g*) 39 & 40 Geo. III. c. 98. Conf. *Freke v. Carbery* (1873), L. R. 16 Eq. 461.

(*h*) As to Rules 198—202, and the illustrations thereof, the reader should note that:—(1) Unless the contrary is expressly stated or is apparent from the context, they refer exclusively to (a) powers of appointment *created* under an *English instrument*; (b) powers of appointment exercised *by will*; (c) powers in regard to *movable property*. (2) The word “exercise” is throughout employed with reference to a power; the word “execute” or “make,” with reference to a will. For American law as to wills in exercise of power, see Minor, s. 150; Wharton. (3rd ed.), s. 590. *Seemle*, the leading American case is *Sewall v. Wilmer* (1882), 132 Mass. 131, 137; and compare *Cotting v. De Sartigas* (1892), 17 R. I. 668. See Story, s. 473a, especially note to 8th edition. Power of appointment by will is sometimes not revoked by marriage. Wills Act, 1837, s. 18. The exercise of power of appointment by will is not revoked by the marriage alone either of a testator or testatrix, when such will was made in exercise of a power of appointment vested in him or her, and the estate would not have passed in default of appointment to his or her representatives. 1 Steph. Comm. (14th ed.), p. 362. See as to revocation, p. 736, *ante*; and compare p. 757, note (*n*), *post*.

The term "English instrument" in this Rule and in the following Rules means an instrument (*e.g.*, a settlement or a will) which creates a power of appointment, and operates under English law.

Comment.

As to power of appointment by will generally.—Under English law a person can by an instrument, such as a marriage settlement or a will, give to some other person (*i*) a power to appoint by will the person or persons who shall succeed to movable property on the death of the person to whom the power is given. The person who thus gives or creates the power is called "the donor of the power"; the person to whom the power is given, and who therefore can exercise the power, is called "the donee of the power," or "the appointor," and the power is independent of any interest in the property vested in the donee of the power; the person in whose favour the power is exercised is called "the appointee." Now the donor of the power, the donee, and the appointee may each be personally subject to the laws of different countries. The donor may be—and when, as under this Rule, we are dealing with an English instrument, generally though not invariably is—an Englishman domiciled in England; the donee may be a French citizen domiciled in France; the appointee in whose favour the power is exercised may be an American citizen domiciled in New York; and further, each one of these persons may change his domicile and nationality after the creation of the power of appointment. Hence the exercise of a power often raises questions connected with the conflict of laws. The following inquiries, among others, suggest themselves: First, by the law of what country, or more shortly, by what law, will an English Court determine the *capacity* of a donee to exercise a power of appointment by will? (*k*). Secondly, by what law will such Court determine how far a given will is a *formally valid* exercise of such power? (*l*). Thirdly, by what law will an English Court determine the *interpretation*, or—a somewhat different thing—the material validity and operation, of the exercise of such power? (*m*). It might indeed be thought that, as

(*i*) Or retain for himself.

(*k*) See Rule 198.

(*l*) See Rules 199, 200, pp. 744, 750, *post*.

(*m*) See Rules 201, 202, *post*.

we are here concerned only with the exercise of a power of appointment by will, the answer to these questions, and others of the same kind, must be the same as the answer to similar inquiries with regard to the validity, &c. of a will (*n*) of movables, and that, for instance, as the capacity of a testator to make such will is governed by the law of the country where he is domiciled, so the capacity of the donee of a power to make a will, which shall be a valid exercise of the power, must also invariably depend upon the law of the donee's domicile. But this is not so. The making of a will, and the exercise by will of a power of appointment, are, according to English law, different things. A man who makes an effective will necessarily disposes of his own property, or of property in which he has some interest. The exercise, on the other hand, of a power to appoint by will is not in strictness disposal of property belonging to the donee (*o*). He usually has, it is true, some interest in the property in respect of which he exercises the power; but this is not necessarily the case (*p*). Whilst, again, the making of a will is strictly an exercise of testamentary capacity on the part of the testator, the exercise of a power by will is, for some purposes at any rate, the carrying out by the donee of the power of the wishes of the donor (*e.g.*, the settlor) by whom the power is created. *T*, in short, who exercises the power of appointment, is sometimes regarded not as a testator making his own will, but rather the donor's mandatory, or agent, who, within the limits of the authority or discretion given to him, is carrying out the intentions of his principal, the donor (*q*). These characteristics of a power of appointment by will must be borne in mind, as they account for, if they do not always justify, the anomalies of some of the rules hereinafter laid down as to the exercise of powers of appointment in connection with the conflict of laws (*r*).

(*n*) See Rules 194—197, pp. 716—732, *ante*.

(*o*) See the Wills Act, 1837, s. 27, and compare Rule 201, and p. 759, *post*.

(*p*) Thus *S* might settle property upon *A* for life, subject to a power of appointment by will on the part of *T* designating the person to whom the property should pass on the death of *A*.

(*q*) "The power given is a mandate; the moment that mandate is exercised it seems to me that the mandator's intention takes legal effect, not from the exercise of the mandate, but from the gift of the person who delegated the power to exercise his will." *In re D'Angibau* (1880), 15 Ch. D. 228, 243, judgment of Brett, L. J. See *In re Broad*, [1901] 2 Ch. 86; but compare *Farwell on Powers* (3rd ed.), pp. 140—142.

(*r*) Compare Rule 199 (1) (a) and (b), and comment thereon, pp. 744, 745, *post*.

As to capacity.—From the nature of a power of appointment, as described above, it follows that the question of the capacity of the donee to exercise the power may be considered from two aspects, either from the point of view of the testamentary capacity of the donee according to the law of his domicile, or from the point of view of the donor's domicile. If *T*, the donee of a power of appointment, is under the law of his domicile capable to execute a will, it is reasonable to assume that he has capacity to exercise by will a power of appointment (*s*), although a minor domiciled in England cannot exercise by will a power of appointment to personal estate (*t*). On the other hand, it does not follow that a person of full age in the view of English law cannot exercise a power of appointment because incapable under the law of his domicile to make a will. "The distinction," it has been laid down (*u*), "between power and property is well settled, and it is really not "relevant to the consideration of the execution of a power to "enquire whether the donee of the power can dispose of his property, unless, of course, there be absolute incapacity to execute "any document arising from lunacy, or the like. Thus, it has "been held by the Court of Appeal and Jessel, M. R., that an "infant can exercise by deed a general power of appointment over "personalty—at least, if it be not limited to himself in default "of appointment (*In re D'Angibau* (*x*))—although he can, of "course, have no disposing capacity over his own property, because the authority to dispose proceeds from the donor of the "power, and not from the donee. It follows, therefore, that the "execution of any power of appointment validly created and given "to a foreigner is in no way affected by any disability which he "or she may be under to dispose of his or her own property by "the laws of his or her domicile." But this statement was made in a case where the matter at issue was not capacity in the sense here adopted but material validity, and it has now been decided that even as regards material validity it is to be restricted to cases of the exercise of a special as distinct from a general power (*y*). It seems, however, clear on principle that, just as a power can be

(*s*) *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 393.

(*t*) See the Wills Act, 1837, s. 7. There is an exception to this rule in the case of an infant soldier or sailor. See *In re Wernher, Wernher v. Beit*, [1918] 2 Ch. (C. A.) 82, 90—92, *per* Swinfen Eady, L. J.; 7 & 8 Geo. 5, c. 58.

(*u*) *Pouey v. Hordern*, [1900] 1 Ch. 492, 494, 495, judgment of Farwell, J.

(*x*) (1880), 15 Ch. D. 228. Compare *In re Cardross's Settlement* (1878), 7 Ch. D. 728.

(*y*) See Rule 202, p. 758, *post*.

exercised by a person domiciled abroad by a will made in a form appropriate to an English will (*z*), so a person possessing capacity under English law can exercise a power though incapable of making a will by the law of his domicil.

Illustrations.

1. *T*, the donee of a power of appointment by will, is a French-woman domiciled in France. She makes a will when under the age of twenty-one. She has testamentary capacity by French law. She has capacity to exercise the power (*a*).

2. *T* is the donee of a power to appoint by will. He has attained the age of twenty-one, but is domiciled in a country according to the law whereof he remains a minor and is incapable of making a will till he attains the age of 22. He has capacity to exercise the power (*b*).

(ii) *Formal Validity (c)*.

RULE 199 (*d*).—A will of personal estate made in exercise of a power of appointment by will conferred by an English instrument is entitled to be admitted to probate, and is, as far as form is concerned, a good exercise of the power where the will—

(1) complies with any of the following conditions as to form (that is to say)—

(a) where the will is executed in accordance with the form required by the ordinary testamentary law of

(*z*) See Rule 199, p. 744, *post*.

(*a*) Compare *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 393.

(*b*) *I.e.*, he will be held by English Courts to have the capacity. In such a case the power must doubtless be exercised in a form valid under the Wills Act, 1837, or the Wills Act, 1861 (Rule 199, p. 744, *post*).

(*c*) See note (*h*), p. 740, *ante*.

(*d*) Westlake (5th ed.), s. 91; 1 Williams, Executors (11th ed.), p. 281; Foote (4th ed.), pp. 260—264; *Tatnall v. Hankey* (1838), 2 Moore, P. C. 342; *Barnes v. Vincent* (1846), 5 Moore, P. C. 201, 217; *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *D'Huart v. Harkness* (1865), 34 Beav. 324; 34 L. J. Ch. 311; *In re Kirwan's Trusts* (1883), 25 Ch. D. 373; *In re Walker*, [1908] 1 Ch. 560; *Murphy v. Deichler*, [1909] A. C. 447.

England, *i.e.* (if the will be made after the end of 1837), by the Wills Act, 1837 (*e*); or

(b) where the will is executed in accordance with the form required by the law of the testator's (donee's) domicile (*f*); or

(c) where the will is executed in accordance with any form which is valid under the Wills Act, 1861 (*g*), *i.e.*, where the will is valid either under Exception 1 (*h*) or Exception 2 (*i*) to Rule 195 or under Rule 197; and

(2) is executed in accordance with the terms of the power as to execution (*k*).

Comment.

The exercise of a power under an English instrument to appoint "by will" or "by will duly executed" is satisfied as *to form* by the fulfilment of two requirements. The one is that the will shall be executed in accordance with some one of the three

(*e*) See the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26), ss. 9, 10, 34; *Tatnall v. Hankey* (1838), 2 Moore, P. C. 342; *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In Goods of Huber*, [1896] P. 209; *In Goods of Tréfond*, [1899] P. 247; *In Goods of Vannini*, [1901] P. 330; *Murphy v. Deichler*, [1909] A. C. 447; *In re Baker*, [1908] W. N. 161. Compare *Murray v. Champernowne*, [1901] 2 Ir. R. 231, 238.

(*f*) *D'Huart v. Harkness* (1865), 34 Beav. 324; 34 L. J. Ch. 311; *Milnes v. Foden* (1890), 59 L. J. P. D. 62; *In re Walker*, [1908] 1 Ch. 560; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620; *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391. A will in this form can deal with movables only. And see Rule 194, p. 719, *ante*; *In re Pryce*, [1911] 2 Ch. (C. A.) 286.

(*g*) See 24 & 25 Vict. c. 114, ss. 1, 2, and 3. See, however, *contra*, 1 Williams, Executors (10th ed.), p. 284, based upon *In re Kirwan's Trusts* (1883), 25 Ch. D. 373; and *Hummel v. Hummel*, [1898] 1 Ch. 642; but compare *In re Price*, [1900] 1 Ch. 442, 452, judgment of Stirling, J.; Conflict (2nd ed.), pp. 821—828; *In re Simpson*, [1916] 1 Ch. 502; *In re Lyne's Settlement Trusts*, [1919] 1 Ch. (C. A.) 80.

(*h*) See p. 725, *ante*.

(*i*) See p. 729, *ante*.

(*k*) *Barretto v. Young*, [1900] 2 Ch. 339; *In re Walker*, [1908] 1 Ch. 560; and *conf.* Rule 200, p. 750, *post*.

conditions enumerated in Rule 199 (1), *i.e.*, that the will should be a document which, at any rate when the exercise of a power of appointment is concerned, English Courts admit to be a duly executed will. The other requirement is that any special terms or conditions of the power as to the execution of the will shall be followed (*l*).

(a) Where the will is executed in accordance with the Wills Act, 1837.

A will so executed is (if the terms of the power are otherwise followed) a valid exercise of the power quite irrespective of the domicile of *T*, the testator, and though the will might not be a valid will under the law of *T*'s domicile (*m*). This is an admitted, though now a thoroughly established, anomaly. It has been thus explained:—

“The case cited (*In the Goods of Alexander* (*n*)) . . . shows that an appointment by will executed according to the requirements of the power is entitled to probate, though it does not follow the formalities of the law of the domicile. The law takes a liberal view, and where the instrument creating the power directs it to be executed by will, in a particular form, a will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of the domicile. That is, where the instrument creating the power directs it to be executed by will, executed in a particular way, it may be a good will if executed in the form required, though not according to the law of the domicile” (*o*).

In a subsequent case this exposition of the law has been formally approved. “I do not,” says Jeune, Pres., “think it is for me to criticise this exposition, still less to override it, and I cannot in the face of it hold that the will is not a due execution of the power, and refuse probate of it, because it is not made in accordance with the domicile of the testatrix” (*p*).

(*l*) See Rule 199 (2).

(*m*) *In Goods of Alexander* (1865), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In Goods of Huber*, [1896] P. 209; *Thorburn v. Merlin*, [1898] W. N. 56; *In re Prioce*, [1900] 1 Ch. 442, 447, judgment of Stirling, J. In cases (*a*) and (*c*) the will may dispose of personal property and not only movables.

(*n*) (1860), 29 L. J. P. & M. 93.

(*o*) *D'Huart v. Harkness* (1865), 34 Beav. 328, *per Romilly*, M. R. Compare *In Goods of Huber*, [1896] P. 209, 213, judgment of Jeune, Pres.

(*p*) *In Goods of Huber*, [1896] P. 209, 214, judgment of Jeune, Pres. The doctrine is finally established by *Murphy v. Deichler*, [1909] A. C. 447.

(b) Where the will is executed in accordance with the law of the testator's domicile.

The grounds on which such a will may be held a valid exercise of a power have been judicially explained. The explanation, be it noted, is given with reference to a case where a testatrix possessed under an English instrument a power of appointment "to be executed by her will in writing duly executed," and had exercised the power by a will valid according to the law of her domicile, but not valid under or in accordance with the Wills Act, 1837.

"Here," says Romilly, M. R., "I find this:—A sum of money is given simply to such person as [T] shall, by her last will duly executed, appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate: first, those which follow the forms required by the 1 Vict. c. 26, s. 9; and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a sum of money shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognized by the law of this country, but any will which is entitled to probate here. A power to appoint by will simply may be executed by any will which, according to the law of this country, is valid, though it does not follow the forms of the statute" (q).

(c) Where the will is executed in accordance with the Wills Act, 1861.

One of the principles laid down in *D'Huart v. Harkness* (r) is

(q) *D'Huart v. Harkness* (1865), 34 Beav. 324, 327, 328, judgment of Romilly, M. R. It should be noted that the testatrix in this case died before the Wills Act, 1861, came into force, and therefore the decision in the case had no reference to that Act.

(r) (1865), 34 Beav. 324. The contrary view, expressed in *In re Kirwan's Trusts* (1883), 25 Ch. D. 373, is criticised and in effect overruled by *In re Simpson, Coutts & Co. v. Church Missionary Society*, [1916] 1 Ch. 502, 509. Compare 1 Williams, Executors (11th ed.), p. 281; *In re Wilkinson's Settlement*, [1917] 1 Ch. 620, 626; *In re Lyne's Settlement Trusts*, [1919] 1 Ch. (C. A.) 80.

that any will is *primâ facie* an exercise of a power to appoint by will which is so executed that it is entitled to probate in England (s). But this principle is clearly wide enough to cover, and does cover, any will which is formally valid, *i.e.*, which is entitled to probate under Lord Kingsdown's Act (t).

Illustrations.

1. *T* is, in favour of any husband of hers who should be living at her death, donee of a power of appointment by will signed in the presence of two credible witnesses. *T*, in 1831, whilst domiciled in England, exercises the power in favour of her husband. The will is signed in the presence of two credible witnesses. *T*, at her death in 1859, is domiciled in Scotland. Her husband survives her. The will is executed in accordance with the testamentary law of England, but not in accordance with the testamentary law of Scotland. The will is a valid exercise of the power (u).

2. *T* is donee of a power of appointment by will in respect of movables situate in England. *T*, domiciled in Scotland, exercises the power by a will made in accordance with the form required by the law of England, but not in accordance with the form required by the law of Scotland. The will is executed in Scotland (x). The will is a valid exercise of the power (y).

3. *T*, an Englishwoman born a British subject, has power to dispose of 2,000*l.* consols in favour of such persons as she should, by will duly executed, appoint. *T* marries a Frenchman domiciled in France and thereby acquires a French domicile. Whilst domiciled in France she, in 1860, exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, but in a form valid according to the

(s) See note (r), p. 747, *ante*.

(t) *In re Price*, [1900] 1 Ch. 442, places *In re Kirwan's Trusts* on its right footing. *Hummel v. Hummel*, [1898] 1 Ch. 642, professes to follow *In re Kirwan's Trusts*, but there must be some mistake in the report of *Hummel v. Hummel*. The testatrix who exercised the power was clearly not a British subject. See *Re Groos*, [1904] P. 269. Hence the Wills Act, 1861, s. 1, on which *In re Kirwan's Trusts* turns, could have nothing to do with the case.

(u) *In re Alexander* (1860), 29 L. J. P. & M. 93. The dates should be noticed. The will is made before the passing of the Wills Act, 1837, and the testatrix dies before the passing of the Wills Act, 1861, so that neither Act has any application to the case. See *In Goods of Huber*, [1896] P. 209.

(x) So that the Wills Act, 1861, s. 2, has no application. See Exception 2, p. 729, *ante*.

(y) *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90.

law of France. *T* dies in March, 1861 (*z*), domiciled in France. The will is a valid exercise of the power (*a*).

4. *T*, an Englishwoman, has power to dispose of 2,000*l.* consols in favour of such persons as she should, by will duly executed, appoint. *T* is married to a British subject, and is resident but not domiciled in France. Whilst there resident, she, in 1890, exercises her power of appointment in favour of her husband by a will not made in the form required by the English Wills Act, 1837, but executed in a form which is valid according to the law of France (*lex actus*) (*b*). The will is a valid exercise of the power (*c*).

5. *T* is a British subject born in a British colony, where she has her domicile of origin. She is donee of a power to dispose of 2,000*l.* consols in favour of such person as she should, by will duly executed, appoint. She acquires a domicile of choice in France, where she makes her will and where she remains domiciled till the time of her death. The will is made in accordance with the forms required by the law of the colony where *T* has her domicile of origin. The will, even if not formally valid according to French law, is a valid exercise of the power (*d*).

6. *T* is a British subject born in a British colony, where she has her domicile of origin. She is the donee of a power to dispose of 2,000*l.* consols in favour of such person as she should, by will duly executed, appoint. She acquires a domicile of choice in France, where she makes her will whilst still unmarried. After she has made her will she marries a Frenchman, and thereby acquires French nationality (*e*). The will is made in accordance with the forms required by the law of the colony where *T* had her domicile of origin, but not in accordance with the forms required by the law of France. Whether the will is a valid exercise of the power? (*f*).

(*z*) The Wills Act, 1861, has no application. See sect. 5.

(*a*) Compare *D'Huart v. Harkness* (1865), 34 Beav. 324.

(*b*) See Exception 1, p. 725, *ante*, *i.e.*, Wills Act, 1861, s. 1.

(*c*) Compare *D'Huart v. Harkness* (1865), 34 Beav. 324, and *In re Lyne's Settlement Trusts*, [1919] 1 Ch. (C. A.) 80.

(*d*) See Exception 1, p. 725, *ante*, and the Wills Act, 1861, s. 1; as also Rule 197, p. 732, *ante*, and Wills Act, 1861, s. 3; and compare *In Goods of Alexander* (1860), 29 L. J. P. & M. 93.

(*e*) See the British Nationality and Status of Aliens Act, 1914, s. 10, sub-s. (1), and Rule 39, p. 197, *ante*.

(*f*) See the Wills Act, 1861, s. 1, and Exception 1, p. 725, *ante*; the Wills Act, 1861, s. 3, and Rule 197, p. 732, *ante*; *In Estate of Groos*, [1904] P. 269.

The will seems to be a valid will under the Wills Act, 1861, s. 1, which applies to the will of a British subject, and sect. 3, which applies (*In Estate of Groos*) to a will not only of a British subject, but of an alien. In the case *In Goods*

7. *T* has a general power of appointment by will over 2,000*l.* *T* is a British subject domiciled in Italy. *T*, whilst in France, but not there domiciled, executes a holograph will valid by the law of France (*lex actus*), but not attested as required by the Wills Act, 1837, ss. 9 and 10. The will is a good exercise of the power (*g*).

RULE 200 (*h*).—Subject to the exception hereinafter mentioned, no will which does not satisfy the requirements of Rule 199 (*i*) is a valid exercise of a power of appointment by will created by an English instrument.

Comment.

A will is not a valid exercise of a power of appointment if the will either—

(1) Does not comply with some one of the three conditions as to form enumerated in Rule 199, under the heads (*a*), (*b*) and (*c*); or

(2) Does not in every other respect (subject, of course, to the Exception hereinafter mentioned) comply with the terms of the power as to the mode in which the will is to be executed, *e.g.*, the number of witnesses by which the signature of the testator is to be attested.

The combination of Rule 199 and Rule 200 leads, it should be observed, to the following result: A will, on the one hand, may be a valid will entitled to probate and yet not a valid exercise of a power to appoint by will; whilst a will, on the other hand, which is not valid as a will, and therefore not, as such, admissible to probate, may yet be a valid exercise of a power to appoint by will, and therefore in that capacity admissible to probate (*k*).

Suppose, for example, that *T* is a French citizen domiciled in France, who under an English instrument is donee of a power of

of Alexander, moreover, which is not affected by the Wills Act, 1861, it is apparently assumed that a change of domicile on the part of a testator after the execution of his will did not affect the validity of the testamentary execution of a power of appointment.

(*g*) This, no doubt, is inconsistent with *Hummel v. Hummel*, [1898] 1 Ch. 642, but see p. 748, *ante*.

(*h*) *Re Daly's Settlement* (1858), 25 Beav. 456; 27 L. J. Ch. 751; *In re Kirwan's Trusts* (1883), 25 Ch. D. 373; *Barretto v. Young*, [1900] 2 Ch. 339. See the Wills Act, 1837, ss. 9 and 10.

(*i*) See p. 744, *ante*.

(*k*) *In Goods of Huber*, [1896] P. 209; *Pouey v. Hordern*, [1900] 1 Ch. 492. Compare *In re Price*, [1900] 1 Ch. 442, 447, judgment of Stirling, J.

appointment by will, duly executed and attested by three witnesses. If *T* makes a will in his own handwriting and signed by himself, but unattested, the will is a valid will according to the testamentary law of France (*lex domicilii*), and therefore as a will valid in England (*l*), but for want of attestation is not a valid exercise of the power of appointment (*m*). If *T*, on the other hand, makes in France a will in accordance with the form required by the Wills Act, 1837, and, to make all safe (*n*), has the will attested by three witnesses, the will, if not made in accordance with the testamentary law of France (*lex domicilii*), would as a will not be valid in England, but would be a valid exercise of the power (*o*).

Illustrations.

1. *T* is donee of a power of appointment by will, to be exercised in the presence of one or more witnesses. *T* is a British subject. In 1871 *T*, when in France, intending to exercise the power of appointment, makes a will in his own handwriting, which is signed by him but is unattested, and, in virtue of the power, appoints that his daughter shall succeed to a certain fund. The will is valid according to the law of France (*lex actus*), and complies therefore with one of the forms required by the Wills Act, 1861, s. 1. The will is rightly admitted to probate, *i.e.*, is formally valid, but is not a valid exercise of the power (*p*).

(*l*) See Rule 194, p. 719, *ante*.

(*m*) The will falls within Rule 200, and, not being a will executed in accordance with the form required by the Wills Act, 1837, does not fall within the Exception to Rule 200. But it must be remembered that the Court has equitable jurisdiction to remedy defective execution of powers, and will do so in any suitable case. See *In re Walker*, [1908] 1 Ch. 560, 566, compared with *Barretto v. Young*, [1900] 2 Ch. 339, 343. This jurisdiction limits considerably the practical effect of the rule as to attestation.

(*n*) *Semble*, that the will, though made by a French citizen domiciled in France, might be a valid exercise of the power, though attested by only two witnesses. See Exception, p. 752, *post*.

(*o*) See Rule 195, p. 721, *ante*, and Rule 199 (a), p. 744.

(*p*) *In re Kirwan's Trusts* (1883), 25 Ch. D. 373. The will, though a valid will as far as form goes, does not follow the terms of the power, and it is not executed in the manner required by the Wills Act, 1837, *i.e.*, it does not come within either Rule 199, clause 2, or within the Exception to Rule 200. In other words, it falls within Rule 200, and is therefore not a good exercise of the power. If, as stated in *Re Kirwan's Trusts* (see 25 Ch. D. 379, judgment of Kay, J.) *T* at the time of executing the will was domiciled in France, it would have been formally valid without any reference to the Wills Act, 1861. See *D'Huart v. Harkness* (1865), 34 Beav. 324, and p. 747, note (*q*), *ante*. But even so it would not have been a good exercise of the power, as neither were the terms of the power followed nor did the Wills Act, 1837, s. 10, apply. See Exception, p. 752, *post*.

2. *T*, an Englishwoman married to a British subject, has under her marriage settlement a power of appointment in respect of a trust fund. The power is to be exercised by her last will. *T*, when residing in France but domiciled in England, executes in 1856 a will which is not in the form required by the Wills Act, 1837, though it is in a form valid by the law of France. *T* dies in 1856 (*q*). The will is not a valid exercise of the power (*r*).

3. *T*, a French citizen domiciled in France, has a power of appointment to be exercised by will attested by two witnesses. She bequeaths all her property by holograph will, unattested, to certain persons. The will is well executed according to French law. It is admitted to probate. It is not a valid exercise of the power (*s*).

Exception (t).—A will executed in accordance with the form required by the Wills Act, 1837, is, so far as regards the execution and attestation thereof, a valid execution of a power of appointment by will, notwithstanding that it shall have been expressly required, under the instrument creating the power, that a will made in exercise of such power should be exercised with some additional or other form of execution or solemnity.

Comment.

This Exception (*u*) is so wide in its terms that it probably applies to any power of appointment by will which is exercised by

(*q*) Therefore her will does not come within the operation of the Wills Act, 1861. See Exception 1, p. 725, *ante*.

(*r*) *Re Daly's Settlement* (1858), 25 Beav. 456.

(*s*) *Barretto v. Young*, [1900] 2 Ch. 339. The will is not executed in accordance with the formalities required by the power. "The power is not framed, "as in *D'Huart v. Harkness*, so as to be exercisable by the donee by her last "will and testament in writing duly executed, but requires execution with "special formalities which have not been observed." *Ibid.*, p. 343, *per* Byrne, J. See, however, p. 751, *ante*.

(*t*) "And be it further enacted, that no appointment made by will, in exercise "of any power, shall be valid unless the same be executed in manner herein- "before required; and every will executed in manner hereinbefore required "shall, so far as respects the execution and attestation thereof, be a valid execu- "tion of a power of appointment by will, notwithstanding it shall have been "expressly required that a will made in exercise of such power should be "executed with some additional or other form of execution or solemnity." 7 Will. IV. & 1 Vict. c. 26, s. 10.

(*u*) *I.e.*, Wills Act, 1837, s. 10.

a will executed in accordance with the Wills Act, 1837, ss. 9 and 10, but it possibly applies only where the will is made by a person domiciled in England. It has been distinctly laid down that the provisions of sects. 9 and 10 of the Wills Act have no application to the wills of persons not domiciled in England (*x*).

Illustrations.

1. *T*, domiciled in England, has, under an English settlement, a power of appointment by will duly executed and attested by *four* witnesses. *T* exercises the power of appointment by a will in the form required by the Wills Act, 1837, executed in the presence of and attested by *two* witnesses only. The will is a good exercise of the power by virtue of the Wills Act, 1837, ss. 9 and 10.

2. The case is the same as the foregoing, except that *T* is a French citizen domiciled in France, and the will is not valid according to French law (*y*). Whether the will is a good exercise of the power?

3. The case is the same as Illustration 2, except that *T* executes a holograph will signed by *T*, unattested by any witnesses, but valid by French law. The will is (*semble*) not a good exercise of the power (*z*).

(*x*) See *Barretto v. Young*, [1900] 2 Ch. 339, 343, judgment of Byrne, J., citing *In re Price*, [1900] 1 Ch. 442, 451. But both these cases refer to wills executed in accordance, not with the formalities required by the Wills Act, 1837, but with the formalities required by the law of the testator's domicile.

(*y*) It may follow from the consideration that the will is executed in the form required by the Wills Act that, though not valid as a will under the law of the testator's domicile, it is yet a good exercise of a power of appointment by will. See *In Goods of Alexander* (1860), 29 L. J. P. & M. 93; *In Goods of Hallyburton* (1866), L. R. 1 P. & D. 90; *In Goods of Huber*, [1896] P. 209.

It should, however, be noted that in *Barretto v. Young*, [1900] 2 Ch. 339, 343, Byrne, J., distinctly lays down that "the provisions of sects. 9 and 10 of the Wills Act have no application to wills of persons not domiciled in England," citing *In re Price*, [1900] 1 Ch. 442, 451. But both these cases refer to wills executed in accordance with the formalities required by the law of the testator's domicile; and it is open to much doubt whether they cover, as regards sects. 9 and 10, cases where a will is executed, though by a person domiciled abroad, in accordance with the Wills Act, 1837.

(*z*) This is logically right. The will cannot be a good exercise of the power of appointment, except under the Wills Act, 1837, s. 10, but then it would be necessarily an invalid will under sects. 9 and 10. This objection does not apply to a will made as in Illustration No. 2, in accordance with the forms required by the Wills Act, 1837, though the testator is domiciled in a foreign country.

(iii) *Interpretation (a).*

RULE 201.—A general bequest contained in a will of personal estate is to be construed as an exercise of a general power of appointment (*b*).

This Rule applies to such bequest in the following cases, that is to say :—

Case 1.—Where the will is executed by a testator domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will.

Case 2.—Where the will is executed by a testator not domiciled in England in a form valid under the law of his domicile, unless it appears from the will that it was not intended to apply to property over which the testator has a power of appointment (*c*).

Case 3.—Where the will is executed by a testator not domiciled in England in accordance with the forms required by the Wills Act, 1837, ss. 9 and 10, unless a contrary intention appears by the will.

Comment.

This Rule is intended to give the effect of the Wills Act, 1837, s. 27. The object of this enactment was to do away with the then existing rule of interpretation under which a “general bequest,” *e.g.*, of “all *T*’s personal estate” to *A*, was not construed and did not operate as the exercise of a power of appointment conferred upon *T*. The reason of this was that property over which *T*

(*a*) See p. 740, note (*h*), ante.

(*b*) “A bequest of the personal estate of the testator, or any bequest of “personal property described in a general manner, shall be construed to include “any personal estate, or any personal estate to which such description shall “extend (as the case may be), which he may have power to appoint in any “manner he may think proper, and shall operate as an execution of such power, “unless a contrary intention shall appear by the will.” Wills Act, 1837, s. 27 (part).

(*c*) *In re Price*, [1900] 1 Ch. 442; *In re Pryce*, [1911] 2 Ch. (C. A.) 286; *In re Simpson*, [1916] 1 Ch. 502, 510; *In re Wilkinson’s Settlement*, [1917] 1 Ch. 620; *In re Lewal’s Settlement Trusts*, [1918] 2 Ch. 391. These cases establish the doctrine as against the contrary view in *In re D’Este’s Settlement*, [1903] 1 Ch. 898; *In re Scholefield*, [1905] 1 Ch. 408.

had a power of appointment was not in strictness *T*'s own property. The effect of the rule established by the Wills Act, 1837, s. 27, is that such a general bequest is now construed as including all personal property, and therefore all movable property, over which *T* has a general power of appointment (*d*). But the rule, after all, is a rule of interpretation—i.e., as the Act says, it only applies “unless a contrary intention appears by the will”—and would not operate, for example, to take the simplest case, if the will were to contain the statement that the general bequest of all *T*'s personal property was not intended to include certain property over which he had a power of appointment, and the same result must, it would seem, follow if the general tenour of *T*'s will should show that a general bequest was not intended to operate as the exercise of a power of appointment.

When, however, it is established that *T*'s will contains a general bequest of *T*'s personal estate, a question, which may often be a difficult one, requires an answer, namely, What are the cases in which the rule of construction contained in sect. 27 of the Wills Act, 1837, applies? The answer appears to be that it is applicable in the three cases enumerated in Rule 201:—

Case 1.—Here the rule of construction laid down in Rule 201 clearly applies; for a will of personal estate executed by a person domiciled in England in accordance with the forms required by the Wills Act, 1837, s. 10, is the kind of will which obviously comes within the scope of the Wills Act, 1837. It is, so to speak, the normal English will, and, if no contrary intention appears by the will itself, must be construed in accordance with the rule of construction laid down by English law.

Case 2.—The rule in this case has only recently been settled, after it had been held in two cases (*e*) that it could only be assumed that sect. 27 was only to be applied if this was made clear in the will itself. The propriety of the rule as now laid down is obvious (*f*); a will executed by a testator domiciled abroad according to the form permissible by the law of his domicile is in effect a substitute for the will executed by a testator domiciled in England in accordance with the Wills Act, 1837, and it is perfectly legiti-

(*d*) Sect. 27 does not apply to a “limited” power of appointment, e.g., where *T* is donee of a power of appointment, which is limited to a particular class, e.g., to any of *T*'s children. See Farwell on Powers (3rd ed.), pp. 257, 258.

(*e*) *In re D'Este's Settlement*, [1903] 1 Ch. 898; *In re Scholefield*, [1905] 1 Ch. 408; this case, however, was compromised on appeal, [1907] 1 Ch. 664.

(*f*) So also in the United States. *Sewall v. Wilmer* (1882), 132 Mass. 131.

mate to apply to such a will a rule of construction which applies to a will executed under that Act (*g*).

Case 3.—It is fairly certain, that the principle which governs Case 2 here applies. For the form of the will, especially if combined with the use of the technical terms of English law, is, or at any rate may be, a sufficient indication of the testator's intention that a general bequest contained in the will shall be construed in accordance with the rule of construction contained in the Wills Act, 1837, s. 27. Still, with regard to Case 3, one must, in the absence of conclusive decisions (*h*), speak with hesitation. The Wills Act, 1837, it may be said, does not, as regards wills of personal estate, apply to wills made by persons domiciled abroad, and therefore a particular section of that Act cannot of itself apply to such wills without a clear expression of the testator's intention that it shall apply. To this objection there are two replies. The first is that a will executed in accordance with the Wills Act, 1837, though not in accordance with the formalities required by the law of the testator's domicile, may be a valid exercise of a power of appointment by will (*i*), and therefore may be construed in regard to such power of appointment by the rule of construction applicable to an English will executed by a person domiciled in England. The second is that the effect of the Wills Act, s. 27, arises in this case, not from the Act itself applying to the wills of persons domiciled out of England, but from the fact that sect. 27 is, through the form in which the will is drawn, imported by the testator himself into the will as a rule of construction.

Illustrations (*k*).

1. *T* is an Englishwoman domiciled in England. The will is made in accordance with the Wills Act, 1837. The will is to be construed as an exercise of the power.

2. *T* is a French citizen domiciled in France. She executes a holograph will made in a French form and unattested. It is valid by the law of France. According to French law it would be a

(*g*) A will in Case 2 can deal only with movables.

(*h*) See, however, *In re Baker's Settlement Trusts*, [1908] W. N. 161, which is a decision in this sense.

(*i*) See Rule 199 (1) (*a*), p. 744, *ante*.

(*k*) In the illustrations to this Rule it is to be assumed, unless the contrary is stated, that *T* is a woman who, under an English settlement, has a general power of appointment by will over 1,000*l.* consols, and that she has made a general bequest of all her personal property or all her movable property to *A*.

complete disposition of all property over which *T* has the power to dispose, but French law does not know of powers of appointment and would, under the circumstances, apply the law of England with reference to the exercise of such a power. The will contains expressions from which it may be inferred that *T* meant her will to operate in England as well as in France, and wrote it with reference to the law of England. The will is to be construed as an exercise of the power (*l*).

3. *T*, a French citizen domiciled in France, executes a will in English complying with the requirements of the Wills Act, 1837, and expressed in the terms of English law. The will refers to a general power of appointment given under an English settlement. The will is to be construed as an exercise of the power (*m*).

4. *T*, whilst a British subject domiciled in England, executes a will in accordance with the requirements of the Wills Act. *T*, after executing the will, acquires a French domicile and dies domiciled in France. *T*'s will is (*semble*) to be construed as an exercise of the power (*n*).

5. *T*, a British subject domiciled in France, executes a holograph will unattested and valid by the law of France. *T* expresses in the will, directly or indirectly, her intention that it shall be construed in accordance with the law of England. The will is to be construed as an exercise of the power (*o*).

6. *T*, a French subject domiciled in France, executes a holograph will in the French form and unattested. It is valid by French law. It contains no words introducing the principle of

(*l*) *In re Price*, [1900] 1 Ch. 442. "I think that I am entitled [in this case] "to apply the rules of construction which would by English law be applied to "a will expressed in the same terms and of the same date as that annexed to the "letters of administration, including the rule of construction introduced by "sect. 27 of the Wills Act." *Ibid.*, p. 453, judgment of Stirling, J. See *In re Harman*, [1894] 3 Ch. 607.

(*m*) And probably would have been a valid exercise of the power of appointment if no reference had been made thereto. See *In re Price*, [1900] 1 Ch. 442; *In re Baker's Settlement Trusts*, [1908] W. N. 161.

(*n*) This seems to follow from the Wills Act, 1837, s. 27, taken together with the Wills Act, 1861, s. 3, and *In re Price*, [1900] 1 Ch. 442. Further (*semble*), that, assuming marriage is not under French law the revocation of a will (*In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211), *T*'s will would not have been revoked had she acquired a French domicile by marriage. See *Westerman v. Schwab* (1905), 13 Sc. L. T. 594.

(*o*) This seems to follow from *In re Price*, [1900] 1 Ch. 442. See *In re Simpson*, [1916] 1 Ch. 502.

construction contained in the Wills Act, 1837, s. 27, but makes a general bequest. The will is a valid exercise of a general power of appointment which *T* has under an English marriage settlement (*p*).

(iv) *Material Validity.*

RULE 202.—The operation of the exercise by will of a power of appointment, created either under an English or under a foreign instrument, depends (it would seem) in the case of

- (a) a special power of appointment, on the law which governs the operation of the instrument, and not on the law which governs the operation of the will (*q*);
- (b) a general power of appointment, on the law which governs the operation of the will, and not on the law which governs the operation of the instrument (*r*).

Comment.

This Rule, in so far as it can be looked upon as established, seems to be the logical result of the circumstance (to which attention has already been called) that the exercise of a power of appointment by will on the part of a donee, *i.e.*, the testator, may be regarded in two different ways: it may be looked upon either, on the one hand, as the simple expression by the donee of the wishes of the donor, or, on the other hand, as a will giving expression to the wishes of the donee, *i.e.*, the testator. Now where the power is a limited power, *e.g.*, where the donee has a special or limited (*s*) power of deciding to which among the children or

(*p*) *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391.

(*q*) *Pouey v. Hordern*, [1900] 1 Ch. 492; *In re Pryce*, [1911] 2 Ch. (C. A.) 286, language of Cozens-Hardy, L. J., p. 297.

(*r*) *In re Pryce*, [1911] 2 Ch. (C. A.) 286; *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391, 398.

(*s*) As to the distinction between a general power and a special or limited power, see Farwell on Powers (3rd ed.), p. 8. "Powers may be either general or limited. General powers are such as the donee can exercise in favour of such person or persons as he pleases, including himself. Limited powers, which are sometimes also called special powers, are such as the donee can exercise only in favour of certain specified persons or classes."

descendants of the donor certain property shall be left, the action of the donee is most naturally considered as the giving effect, as it were, by an agent to the wishes or intentions of the donor, and the will made under such special power is held to be governed as to its effect by the law to which the donor of the power was subject, *e.g.*, the law of England (*t*). When, on the other hand, the power of appointment is a general power so that the donee might under the power leave the property subject thereto to any person whom he chose, then the exercise of the power of appointment is looked upon as being in fact the exercise of ordinary testamentary power by the donee and subject as regards the limitations and effects thereof to the law to which the donee's testamentary power would in an ordinary case be subject, the law in the case of movables, of the country, *e.g.*, France, where the donee dies domiciled.

It should, however, be noted that while each part of this Rule can be justified or explained by considering the difference between a general and a limited power of appointment, the Rule itself cannot be laid down with absolute certainty, for it is at least open to question whether our Courts do or do not fully accept the distinction drawn between the law affecting the effects of an exercise of a power of appointment by will where the power is limited, and where the power is general (*u*). The difference has apparently been overlooked in some reported cases, and those judges, it is submitted, who question the existence of this distinction, in effect hold that the law governing the legal effects of a power of appointment by will must in all cases depend on the law which governs the operation of the instrument creating the power, and not on the law which governs the operation of the will. The clearest expression of judicial opinion in favour of the doctrine laid down in this Rule is still to be found in the criticism pronounced on Rule 192, in the second edition of this work, by Cozens-Hardy, M. R. (*x*): "The proposition deduced from [the

(*t*) There seems no ground for differentiating in this Rule between powers created under English and under foreign instruments.

(*u*) See especially Farwell (3rd ed.), pp. 153, 154.

(*x*) See *In re Pryce*, [1911] 2 Ch. (C. A.) 286, 297, *per* Cozens-Hardy, M. R.

Note that the decision *In re Hadley*, [1909] 1 Ch. (C. A.) 20, which dealt with the extent of the property which passes to the executor as such under the Finance Act, 1894, s. 2, sub-s. (1), and which was referred to in this case, has been overruled in *O'Grady v. Wilmot*, [1916] 2 A. C. 231, but this does not seem to invalidate the decision *In re Pryce*. See also *In re Lewal's Settlement Trusts*, [1918] 2 Ch. 391, 398; *Beyfus v. Lawley*, [1903] A. C. 411, 413, *per* Lord Lindley; *In re Wernher*, [1918] 2 Ch. (C. A.) 82, 92, *per* Swinfen Eady, L. J.

“decided] cases in Dicey [Conflict of Laws, 2nd ed. p. 705] seems to me to be too widely stated. It should exclude cases in which the power has been so exercised as to throw the appointed fund into the appointor’s own estate, and to deal with the whole as “one mass.”

The one question of importance with which this Rule is practically concerned is how far the capacity of a donee to give effect by will to a power of appointment is affected by limits placed on his testamentary freedom by the law of the donee’s domicile (*y*).

Illustrations.

1. *T*, an Englishwoman, has under an English marriage settlement a special power of appointment by will over funds in England in favour of specified children. In 1890 *T*, being then married to a Frenchman domiciled in France, exercises such power over such funds amounting to 4,000*l.* in favour of *A*, one of such children. *T* exercises the power by will in English form. The will is admitted to probate. It is contended that *T*, being a French citizen domiciled in France, has, under the Code Civil, Bk. III. art. 913, no capacity to disinherit her other children. The power of appointment is a special power. Her exercise, therefore, of the power is valid (*y*).

2. *T*, before her marriage domiciled in England, has a general power of appointment by will over certain movables in England. *T* marries *H*, a Dutchman domiciled in Holland. By her will in Dutch form, but admitted to probate in England, she appoints her husband, *H*, sole heir of the whole of the property of which the law in force at the time of her death should allow her to dispose in his favour. *T* dies domiciled in Holland. According to both Dutch and English law the exercise of the power of appointment has the effect of making the appointed property *T*’s assets for all purposes. Under Dutch law *T* has no power to dispose of more than seven-eighths of such appointed property. *H* is beneficially entitled to only seven-eighths of such appointed property (*z*).

(*y*) *Pouey v. Hordern*, [1900] 1 Ch. 492. See also *In re Pryce*, [1911] 2 Ch. (C. A.) 297, *per* Cozens-Hardy, M. R.

(*z*) *In re Pryce*, [1911] 2 Ch. (C. A.) 286. So *In re Lewal’s Settlement Trusts*, [1918] 2 Ch. 391, the operation of a general power exercised by a domiciled Frenchwoman under twenty-one was restricted to the disposal of only one-half of the appointed property in accordance with French law.

CHAPTER XXXII.

PROCEDURE (a).

RULE 202 (a).—All matters of procedure are governed wholly by the local or territorial law of the country to which a Court wherein an action is brought or other legal proceeding is taken belongs (*lex fori*).

In this Digest, the term “procedure” is to be taken in its widest sense, and includes (*inter alia*)—

- (1) remedies and process ;
- (2) evidence ;
- (3) limitation of an action or other proceeding ;
- (4) set-off or counter-claim.

Comment.

The principle that procedure is governed by the *lex fori* is of general application and universally admitted, but the Courts of any country can apply it only to proceedings which take place in, or at any rate under the law of, that country. In a body of Rules, therefore, such as those contained in this Digest, which state the principles enforced by an English Court, the maxim that procedure is governed by the *lex fori* means in effect that it is governed by the ordinary law of England, without any reference to any foreign law whatever. The maxim is in fact a negative rule; it lays down that the High Court, in common, it may be added, with

(a) Story (8th ed.), ss. 556—583; see also chap. xvii.; Westlake, chap. xviii.; Foote, chap. x. For Scotland, compare *Jones v. Somervell's Tr.*, [1907] S. C. 545.

The decree of a foreign Californian Court cannot authorise a person to sue in an English Court otherwise than in accordance with the English rules of procedure. *Barber v. Mexican Land Co.* (1900), 48 W. R. 235.

every other English Court, pursues its ordinary practice (b) and adheres to its ordinary methods of investigation whatever be the character of the parties, or the nature of the cause which is brought before it.

"A person," it has been said, "suing in this country, must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to" (c), and the foreign defendant, it may be added, is to have the advantages, if any, which the form of procedure in this country gives to every defendant.

Whilst, however, it is certain that all matters which concern procedure are in an English Court governed by the law of England, it is equally clear that everything which goes to the substance of a party's rights and does not concern procedure is governed by the law appropriate to the case.

"The law on this point is well settled in this country, where this distinction is properly taken, that whatever relates to the remedy to be enforced must be determined by the *lex fori*,—the law of the country to the tribunals of which the appeal is made" (d),—but that whatever relates to the rights of the parties must be determined by the proper law of the contract or other transaction on which their rights depend.

Our Rule is clear and well established. The difficulty of its application to a given case lies in discriminating between matters which belong to *procedure* and matters which affect the *substantive rights* of the parties. In the determination of this question two considerations must be borne in mind:—

First. English lawyers give the widest possible extension to the meaning of the term "procedure." The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice; it includes the whole law of evi-

(b) As to security for costs, see *Redondo v. Chayter* (1879), 4 Q. B. D. (C. A.) 453, 457, 458, *per* Thesiger, L. J. An alien, even if temporarily resident only in England, cannot be required to give security for costs.

(c) *De la Vega v. Vianna* (1830), 1 B. & Ad. 284, 288, judgment of Tenterden, L. J.

(d) *Don v. Lippmann* (1837), 5 Cl. & F. 1, 13, *per* Lord Brougham.

dence (e), as well as every rule in respect of the limitation (f) of an action or of any other legal proceeding for the enforcement of a right, and hence it further includes the methods, e.g., seizure of goods or arrest of person, by which a judgment may be enforced (g).

Secondly. Any rule of law which solely affects, not the *enforcement* of a right, but the *nature* of the right itself, does not come under the head of procedure. Thus, if the law which governs, e.g., the making of a contract, renders the contract absolutely void, this is not a matter of procedure, for it affects the rights of the parties to the contract, and not the remedy for the enforcement of such rights.

Hence any rule limiting the time within which an action may be brought, any *limitation* in the strict sense of that word, is a matter of procedure governed wholly by the *lex fori*. But a rule which after the lapse of a certain time extinguishes a right of action—a rule of *prescription* in the strict sense of that word—is not a matter of procedure, but a matter which touches a person's substantive rights, and is therefore governed, not by the *lex fori*, but by the law, whatever it may be, which governs the right in question. Thus if, in an action for a debt incurred in France, the defence is raised that the action is barred under French law by lapse of time, or that for want of some formality an action could not be brought for the debt in a French Court, the validity of the defence depends upon the real nature of the French law relied upon. If that law merely takes away the plaintiff's *remedy*, it has no effect in England. If, on the other hand, the French law extinguishes the plaintiff's *right* to be paid the debt, it affords a complete defence to an action in England (h).

To this it must be added that an English statutory enactment, which affects both a person's right and the method of its enforcement, establishes a rule of procedure and therefore applies to an

(e) A party or witness cannot be compelled to disclose anything tending to expose him to criminal proceedings or forfeiture abroad. *United States of America v. McRae* (1867), 4 Eq. 327; 3 Ch. 79.

(f) See *contra*, Savigny, s. 374 (Guthrie's transl.), pp. 249, 267—272; Bar (Gillespie's transl.), pp. 624—627.

(g) Where a person is bankrupt in England and is a partner in a firm abroad which is being administered in bankruptcy, the right of the creditors to prove against the firm, and also in England, depends on the English law as to double proofs. *Ex parte de Mello Mattos* (1834), 1 M. & A. 345; *Ex parte Goldsmid* (1856), 1 De G. & J. 257.

(h) See Intro., General Principle No. I., p. 23, *ante*.

action in respect of a right acquired under foreign law. Hence the 4th section of the Statute of Frauds (*i*), and the 4th section of the Sale of Goods Act, 1893, which, whether affecting rights or not, certainly affect procedure (*k*), apply to actions on contracts made in a foreign country and governed by foreign law. Whence the conclusion follows that a contract though made abroad, which does not satisfy the provisions of the 4th section of the Statute of Frauds, or of the Sale of Goods Act, 1893, respectively, cannot be enforced in England.

With regard to the Illustrations to this Rule it must always be borne in mind that, as we are dealing with proceedings before an English Court, the *lex fori* is the same thing as the law of England.

Illustrations.

Lex Fori governs Procedure.

(1) *Remedies and Process.*

1. *A* brings an action against *X* for breach of a contract made with *X* in Scotland as a member of a Scottish firm. According to the law of Scotland (*lex loci contractus*), *A* could not maintain an action against *X* until he had sued the firm, which he has not done. According to the law of England (*lex fori*), the right to bring an action against the member of a firm does not depend upon the firm having been first sued. *A* can maintain an action against *X* (*l*).

2. *A*, a Portuguese, at a time when arrest of a debtor on mesne process is allowable under the law of England (*lex fori*), but is not allowable under the law of Portugal (*lex loci contractus*), brings an action against *X*, a Portuguese, for a debt contracted in Portugal. *A* has a right to arrest *X* (*m*).

3. *A*, in Spain, sells *X* goods of the value of 50*l*. The contract is made by word of mouth, and there is no memorandum of it in

(*i*) *Leroux v. Brown* (1852), 12 C. B. 801. The Statute of Frauds, s. 7, relates to procedure, and applies to proceedings having reference to foreign land. *Rochefoucauld v. Boustead*, [1897] 1 Ch. (C. A.) 196. Compare *In re De Nicols*, [1900] 2 Ch. 410; p. 556, *ante*.

(*k*) *Jones v. Victoria Graving Co.* (1877), 2 Q. B. D. 314, 323, language of Lush, J.

(*l*) *Bullock v. Caird* (1875), L. R. 10 Q. B. 276. Compare *In re Doetsch*, [1896] 2 Ch. 836, as to the administration of a deceased partner's estate.

(*m*) *De la Vega v. Vianna* (1830), 1 B. & Ad. 284, with which contrast *Melan v. Fitzjames* (1797), 1 B. & P. 138. See also *Liverpool Marine Credit Co. v. Hunter* (1868), L. R. 3 Ch. 479, 486.

writing. The contract is valid and enforceable according to Spanish law (*lex loci contractus*). A contract of this description is, under the Sale of Goods Act, 1893, s. 4 (*lex fori*), not enforceable by action. A cannot maintain an action against X for refusal to accept the goods (n).

4. X, a man residing in England, writes to A, a Danish woman residing in Denmark, an offer of marriage. A accepts the offer by letter. It is intended that the contract shall be carried out in England. Danish law does not permit an action for breach of promise of marriage except in circumstances which in this instance do not exist. A brings an action against X in England. An action lies because (1) the contract is an English contract; (2) the law of Denmark does not affect the validity of the contract but the remedy for the breach, and is a law as to procedure (o).

5. In proceedings in the Admiralty Division of the High Court *in rem* the priority as between A, to whom the ship was mortgaged, and X, the master who claims on account of wages and disbursements on the ship, is determined by the law of England (*lex fori*) (p).

6. N & Co., an American banking firm, take out an insurance with A & Co., an American insurance company, under which the latter undertakes to indemnify the bank up to the extent of 2,500 dollars in the event of the default of an employee. The bank also takes out an insurance at Lloyds without limitation of amount. The employee misappropriates 2,680 dollars belonging to the bank, and A & Co. duly pay 2,500 dollars, while 180 dollars is paid by the underwriters at Lloyds. A & Co. bring an action against X,

(n) See *Acebal v. Levy* (1834), 10 Bing. 376, and note that the Sale of Goods Act, 1893, s. 4, differs in wording from the Statute of Frauds, s. 17. The Sale of Goods Act, 1893, s. 4, enacts that no contract which comes within it "shall be enforceable by action." The Statute of Frauds, s. 17, enacted that no contract which comes within it "shall be allowed to be good," but even this enactment probably referred to procedure. Contrast, however, *Story*, ss. 262, 262a.

The Moneylenders Act, 1900 (63 & 64 Vict. c. 51), s. 1, does not effect a contract for a loan made in India and to be carried out there. *Shrichand v. Lacon* (1906), 22 T. L. R. 245.

(o) See *Hansen v. Dixon* (1906), 23 T. L. R. 56.

(p) *The Tagus*, [1903] P. 44. Compare *The Elen* (1883), 8 P. D. (C. A.) 129; *The Milford* (1862), Sw. 362, 366; *Clark v. Bowring & Co.*, [1908] S. C. 1168, Ct. of Sess. A statutory exception to the application of the *lex fori* is laid down by the Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 7, which prescribes that in the allotment of shares of salvage to the owner, master, pilot, crew, or other persons in the service of a foreign vessel, the distribution is to follow the law of the country to which the ship belongs.

one of the underwriters under the Lloyds policy, claiming a contribution. Under English law (*lex fori*) *A & Co.* have an equitable claim to contribution, and *X* must pay a proportion of the total loss in the ratio of 2,680 to 2,500 (*q*).

7. *A* brings an action against *X* to obtain specific performance of a contract made between *A* and *X* in and subject to the law of a foreign country. The contract is one of which *A* might, according to the law of that country (*lex loci contractus*), obtain specific performance, but it is not one for which specific performance can be granted according to the law of England (*lex fori*). *A* cannot maintain an action for specific performance.

(2) Evidence.

8. *A* brings an action against *X* to recover a debt incurred by *X* in and under the law of a foreign country (*lex loci contractus*). *A* tenders evidence of the debt which is admissible by the law of the foreign country, but is inadmissible by the law of England (*lex fori*). The evidence is inadmissible (*r*).

9. *A* brings an action against *X*, an Englishman, for breach of a promise of marriage made by *X* to *A*, a German woman, at Constantinople. *A* has not such corroborative evidence as is required by 32 & 33 Vict. c. 68, s. 2 (*lex fori*). *A* cannot prove the promise or maintain the action (*s*).

10. *A*, a Frenchman, makes a contract in France with *X*, an Englishman, to serve him in France from a future date for a year certain. The contract is made by word of mouth, and there is no memorandum of it in writing. It is a contract valid by the law of France (*lex loci contractus*), for the breach of which an action might be brought in a French Court, but under the 4th section of the Statute of Frauds no action can be brought on such an agree-

(*q*) See *American Surety Co. v. Wrightson* (1911), 103 L. T. 663. The action is maintainable solely in virtue of the equitable jurisdiction of the English Court, and must be determined solely by English law, without regard to the proper law of the contract between *N & Co.* and *X* (which is held to be English law), or the law of the place where the bank is situated. Compare *Burnand v. Rodocanachi* (1880), 5 C. P. D. 424, where the *lex fori* was held to determine the right of the insured to hold the insurer accountable for money received *aliunde* in respect of the loss.

(*r*) *Brown v. Thornton* (1837), 6 A. & E. 185. Compare *Finlay v. Finlay* (1862), 31 L. J. P. & M. 149; *Abbott v. Abbott* (1860), 29 L. J. P. & M. 57; *Bain v. Whitehaven, &c. Railway Co.* (1850), 3 H. L. C. 1.

(*s*) *Wiedemann v. Walpole*, [1891] 2 Q. B. (C. A.) 534.

ment unless there is a memorandum thereof in writing. The enactment applies to procedure. *A* cannot maintain an action in England against *X* for breach of the contract (*t*).

(3) *Limitation.*

11. *X* contracts a debt to *A* in Scotland. The recovery of the debt is not barred by lapse of time, according to Scottish law (*lex loci contractus*), but it is barred by the English Limitation Act, 1623, 21 Jac. I. c. 16 (*lex fori*). *A* cannot maintain an action against *X* (*u*).

12. *X* incurs a debt to *A* in France. The recovery of such a debt is barred by the French law of limitation (*lex loci contractus*), but is not barred by any English Statute of Limitation. *A* can maintain an action for the debt against *X* (*x*).

13. *A* in a Manx Court brings an action against *X* for a debt incurred by *X* to *A* in the Isle of Man. The action, not being brought within three years from the time when the cause of action arose, is barred by Manx law, and judgment is on that account given in favour of *X*. *A* then, within six years from the time when the debt is incurred, brings an action against *X* in England. This action is not barred by the English Limitation Act, 1623 (*lex fori*). *A* can maintain his action against *X* (*y*).

14. *X*, under a bond made in India, is bound to repay *A* 100*l*. Specialty debts have, under the law of India (*lex loci contractus*), no higher legal value than simple contract debts, and under that law the remedy for both is barred by the lapse of three years. The period of limitation for actions on specialty debts is, under the law of England,—3 & 4 Will. IV. c. 42, s. 3 (*lex fori*),—twenty years. *A*, ten years after the execution of the bond, brings an action in England upon it against *X*. *A* can maintain the action (*z*).

(*t*) *Conf. Leroux v. Brown* (1852), 12 C. B. 801; 22 L. J. C. P. 1.

(*u*) *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *Bouchet v. Tullidge* (1894), 11 T. L. R. 87; *Campbell v. Stein* (1818), 6 Dow, 116; *Don v. Lippmann* (1837), 5 Cl. & F. 1; *Ruckmaboys v. Mottichund* (1852), 8 Moore, P. C. 4.

(*x*) *Huber v. Steiner* (1835), 2 Scott, 304. Compare *Fergusson v. Fyffe* (1841), 8 Cl. & F. 121.

(*y*) *Harris v. Quine* (1869), L. R. 4 Q. B. 653. See, as to the judgment, p. 457, *ante*.

(*z*) *Alliance Bank of Simla v. Carey* (1880), 5 C. P. D. 429. Whether this case is rightly decided?

(4) *Set-off.*

15. X in 1855 contracts in Prussia with A for the carriage by A of goods by sea from Memel to London. A brings an action against X for the freight, and X under Prussian law (*lex loci contractus*) claims to set off money, due to him by way of damages from A, which could not at that date be made, according to the rules of English procedure (*lex fori*), the subject either of a set-off or a counter-claim. X is not allowed to set off, against the money due to A, the damages due from A to X (a).

Lex Fori does not govern Existence of Right.

16. A brings an action on a contract made by word of mouth between X and A in and under the law of a foreign country. It is a kind of contract which under the law of England (*lex fori*) is valid though not made in writing, but under the law of the foreign country (*lex loci contractus*) is void if not made in writing. A cannot maintain his action, *i.e.*, the validity of the contract is governed in England, not by the *lex fori*, but by the *lex loci contractus* (b).

17. A brings an action against X for breach of a contract made in a foreign country. It is proved that under the law of that country (*lex loci contractus*) the contract for want of a stamp is unenforceable. If the want of the stamp merely deprives A of his remedy in the foreign country, then he can maintain an action in England for breach of the contract, *i.e.*, the want of the stamp merely affects procedure which is governed by the *lex fori*. If the want of the stamp makes the contract void *ab initio*, then A cannot maintain an action in England, *i.e.*, the want of a stamp affects a matter of right and is governed by the *lex loci contractus* (b).

18. X in 1866 commits an assault upon A in Jamaica. For some time after the assault is committed, A might, had X been in

(a) *Meyer v. Dresser* (1864), 16 C. B. (N. S.) 646; 33 L. J. C. P. 289. Contrast *MacFarlane v. Norris* (1862), 2 B. & S. 783; in a suit in England a debtor in a foreign bankruptcy is entitled to set off against the trustee any claim admissible under the foreign bankruptcy Act. Since the Judicature Acts came into force, the value of the goods not carried could (*semble*) be claimed under a counterclaim. Conf., also, *Allen v. Kemble* (1848), 6 Moore, P. C. 314 (as explained in *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525, 540, 541); *Maspons v. Mildred* (1882), 9 Q. B. D. (C. A.) 530; (1883), 8 App. Cas. 874.

(b) Compare *Bristow v. Sequeville* (1850), 5 Ex. 275; 19 L. J. Ex. 289.

England, have maintained an action for it there against *X*. Before *X* returns to England the legislature of Jamaica passes an Act of Indemnity under which the assault is made lawful. *X* then returns to England, and *A* brings an action against *X* for the assault. *A* cannot maintain the action, *i.e.*, the character of the act done by *X*, or *A*'s right to treat it as a wrong, is governed, not by the *lex fori*, but by the *lex loci delicti commissi* (*c*).

(*c*) See *Phillips v. Eyre* (1870), L. R. 6 Q. B. 1 (Ex. Ch.).

Whether the action would have been maintainable if *X* had returned to England and *A* had commenced the action, but not brought the case to trial, before the passing of the Jamaica Act of Indemnity? The answer is presumably in the negative, at any rate if the Act of Indemnity declares that the actions questioned are to be deemed to have been legal *ex initio*. Compare *The M. Moxham*, (1876) 1 P. D. (C. A.) 107, 111, *per* James, L. J. In the case of succession, however, English Courts ignore retrospective legislation. *In re Agancoor's Trust* (1895), 64 L. J. Ch. 521; p. 713, *ante*.

APPENDIX.

NOTE 1.

MEANING OF "LAW OF A COUNTRY," AND THE DOCTRINE OF THE *RENOI* (a).

The aim in this note is first to insist, in connection with the meaning given by English Courts to the term "law of a country," that they do virtually accept the doctrine of the *renvoi*; and, next, to show the way in which this doctrine can be and generally is applied by an English Court to a given case. With the inquiry whether English Courts act wisely or unwisely, logically or illogically, in accepting the doctrine of the *renvoi*, we have, in this note, no concern whatever.

(A.) *Meaning of "Law of a Country."*

The contention here maintained is that, in any English rule of private international law, the term "law of a country," which is admittedly ambiguous, means, as applied to a foreign country, *e.g.*, Italy (b), any principle or law, whether it be the local law of Italy or not, which the Courts thereof apply to the decision of the case to which the rule refers. This assertion is equivalent to the statement made by other writers, that where English Courts determine a case with reference to the law of a foreign country they take into account the whole law of that country (c), including the rules of private inter-

(a) See pp. 6, 7, 79, 82, *ante*; J. Pawley Bate, "Notes on the Doctrine of *Renvoi*"; Westlake, ch. ii.

(b) It is convenient to exemplify the points under discussion by referring to the law of Italy as the law of the foreign country which English Courts follow, but, of course, what is true of Italy holds good *mutatis mutandis* of the law of any other foreign country, the law whereof English Courts hold applicable to the decision of a given case, *e.g.*, the distribution of the goods left in England by an intestate dying domiciled in a foreign country.

(c) "I conclude with the opinion, as founded in reason, that a rule referring to a foreign law should be understood as referring to the whole of that law, necessarily including the limits which it sets to its own application, without a regard to which it would not be really that law which was applied. It is also the only opinion accepted in the English judgments, and is at least strongly supported on the continent."—Westlake (5th ed.), p. 42.

national law maintained by its tribunals, and that English Courts have always virtually accepted what is now known as the doctrine of the *renvoi*, using that term in its widest sense. An illustration explains our meaning: Our Courts admittedly adhere (*d*) to the rule that where *D* dies intestate leaving movable property in England, but domiciled in Italy, the distribution of such movable property must be governed by the "law of Italy." Our position is that in this rule the "law of Italy" means any law or principle whatever which Italian Courts hold applicable to *D*'s case (*e*): *D*, we will take it, is an Englishman, *i.e.*, a British subject born in England of English parents, with an English domicile of origin. If, because of *D*'s nationality, Italian Courts hold that his movable property ought to be distributed in accordance with the local law of England, an English Court will distribute such property in accordance with the Statute of Distributions. If, on the other hand, Italian Courts, on whatever ground, hold that *D*'s movable property should be distributed in accordance with the local law of Italy, then again an English judge will distribute *D*'s movable property in accordance with Italian local law. An English Court or judge, in short, will attempt to distribute *D*'s movable property in England exactly as an Italian judge would, in the circumstances of *D*'s case, distribute such portion of *D*'s property as, being situate in Italy, came under the actual control of the Italian tribunal. The view opposed to this is, that in the rule to which we have referred, the law of the deceased's domicile, or, to take *D*'s particular case, the "law of Italy," means, or ought to mean, the local or territorial law of Italy (*f*).

The reasons for contending that English Courts put upon the term "law of a country" the meaning we have assigned to it, thus virtually adopting the doctrine of the *renvoi*, may be thus summed up:

(1) The authorities are strong to show that English Courts have generally, if not invariably, meant by the law of a foreign country, the whole law of that country (*g*). Most of the cases referred to in

(*d*) See Rule 193, p. 716, and compare Rule 192, p. 712, *ante*.

(*e*) See p. 79, *ante*.

(*f*) The late Mr. Pawley Bate, in his very learned and interesting "Notes on the Doctrine of *Renvoi*," maintains that English Courts may still, without departing from any principle they have adopted, distribute *D*'s goods in accordance with the local law of Italy, even though an Italian judge would, on account of *D*'s nationality, distribute them in accordance with the local or territorial law of England. (See Pawley Bate, p. 9.)

(*g*) See *Collier v. Rivaz* (1841), 2 Curt. 855; *Maltass v. Maltass* (1844), 1 Rob. 67; *Frere v. Frere* (1847), 5 Notes of Cases, 593; *Bremer v. Freeman* (1857), 10 Moo. P. C. 306, 374; *Crookenden v. Fuller* (1859), 1 Sw. & Tr. 441; 29 L. J. P. & M. 1; *Onslow and Allardice v. Cannon* (1861), 2 Sw. & Tr. 136; *Laneuville v. Anderson* (1860), 2 Sw. & Tr. 24; *In re Brown-Séguard* (1894), 70 L. T. 811; *In Goods of Lacroix* (1877), 2 P. D. 94; *In re Trufort* (1887), 36 Ch. D. 600; *In re Queensland Mercantile & Agency Co.*, [1892] 1 Ch. (C. A.) 219, 226; *Armitage v. Attorney-General*, [1906] P. 135.

support of this statement may be open to minute criticism, but their general tendency is unmistakable (*h*).

Consider particularly *Collier v. Rivaz* (*i*) and the language of Sir H. Jenner in his judgment thereon. *D*, a British subject, died domiciled in Belgium. He left testamentary documents executed by him in accordance with the forms required by English law, but not in accordance with the forms required by the local law of Belgium, that is, not in accordance with the local law of the country where he was domiciled. It was proved, however, that in the position of *D*, the testator, who was not a Belgian subject, these testamentary documents would be considered valid, that is, their validity would be upheld by the Courts of Belgium if these Courts were called upon to decide the matter. Sir H. Jenner thereupon gave judgment in favour of the validity of the will, *i.e.*, admitted it to probate, on the plain ground that "the Court sitting here decides [the case] from the evidence of persons skilled in [Belgian] law and decides it as it would if sitting, in Belgium" (*k*). This doctrine he states more fully as follows:—

"The question, however, remains to be determined, whether these codicils which are opposed are executed in such a form as would entitle them to the sanction of the Court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow, that [*D*] being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native-born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and the subject of another country; and the Court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case" (*l*).

(*h*) This is what Mr. Pawley Bate denies: "English law . . . cannot be said to have either accepted or repudiated the Renvoi-theory in general. In a few cases it has, indeed, given answers favourable to the theory, . . . but it will be seen that they can fairly be described as special cases, not justifying any general statement."—Pawley Bate, p. 9.

(*i*) (1841), 2 Curt. 855.

(*k*) 2 Curt. 863.

(*l*) *Ibid.*, pp. 858, 859. The criticism of this case in *Bremer v. Freeman* (1857), 10 Moore, P. C. 306, 374, is not against the principle, but relates to

The words which have been purposely italicized go to the root of the whole matter. An English Court called upon to determine the succession to the movables of a person dying domiciled in a foreign country (*e.g.*, Belgium) must decide the matter before it as it would if sitting in Belgium, *i.e.*, as if it were a Belgian Court; but this result cannot by any possibility be obtained if the English Court does not take into account the rules of private international law maintained by Belgian tribunals. Let us illustrate the point from *Collier v. Rivaz*. If in that case an English Court had held that the validity of a will made by an Englishman domiciled in Belgium must be determined in accordance with the ordinary local law of Belgium applicable to Belgian subjects, when a Belgian Court would have held that its validity must be determined in accordance with the law, not of Belgium, but of England, it is clear that the English Court would not have acted as if it had been sitting in Belgium or, in other words, had been a Belgian Court.

Take, again, *In Goods of Lacroix*. It was there in substance held by Sir J. Hannen that in the Wills Act, 1861 (Lord Kingsdown's Act), the "law of the place where a will was made" means the law which the Courts of such country hold applicable to the particular case. "If evidence," he says, "can be offered to the Court that by the law of France [where the will was made] it is permitted to a foreigner in France to make his will according to the form required by the law of his country [England] as to the execution of wills there, and that a will so made would be deemed by the French Courts to be good and valid, and would be carried into execution by them, this application [for a grant of probate] may be renewed, as it would then appear that the will . . . [was] valid, as having been made in the form permitted by the law of France in the case of British subjects in France. . . . If the evidence I have suggested can be obtained it will be open to the applicant to contend, and I think successfully, that [the will is] . . . made in accordance with the form required by the law of the place where [it was] made, and must therefore be held to be well executed for the purpose of being admitted to probate in England under 24 & 25 Vict. c. 114" (*m*). The evidence required having been obtained, the will was admitted to probate.

The later case, *In re Trufort* (*n*), has no reference to the Wills Act,

the correctness of the conclusion as to the view taken by Belgian law of the law applicable. It is doubtful if the view taken of French law in *Bremer v. Freeman* was correct. Contrast *In re Brown-Séguard* (1894), 70 L. T. 811.

(*m*) *In Goods of Lacroix* (1877), 2 P. D. 94, 96, 97, judgment of Sir J. Hannen, Pres.

(*n*) (1887), 36 Ch. D. 600.

1861, but it illustrates the same principle. The point to be determined was the distribution of the property of a Swiss citizen who died domiciled in France. In such a matter French law admits the authority of the law of Switzerland, as being the law of the nation to which the deceased belonged. There had been delivered in Switzerland a judgment determining the succession to his movable property. Stirling, J., treated this judgment as binding upon an English Court. "The claim," he laid down, "of the party litigating in this Court has been actually raised and decided in the Courts which, according to the law of the testator's domicile [France] were the proper and competent tribunals to decide on their [*sic*] rights. . . I am bound by their decision" (o). Here, surely, we have a full admission of the principle for which we are contending. English Courts determine the distribution of *D*'s goods in England according to the law of *D*'s domicile (France), but the law of France holds that the distribution of *D*'s movables must be referred to the law of Switzerland. An English judge therefore sees that *D*'s movables are distributed in accordance not with the territorial law of France, but in accordance with the body of law, in the particular instance the law of Switzerland, which French Courts hold applicable to the case, or, in other words, an English judge, in applying the law of *D*'s French domicile, takes into account the whole of French law, and among other things, the rule of French private international law, that *D*'s movables must be distributed in accordance with the law of the country, in this instance Switzerland, to which a man belongs by nationality (p).

(2) The foregoing cases deal rather with jurisdiction than with choice of law. This point is noticeable. In truth, the acceptance of the doctrine of *renvoi* by English Courts is most intimately connected with their theories as to jurisdiction. Once admit that the Courts of a particular country, *e.g.*, Italy, have primary jurisdiction over a particular case, and it almost inevitably follows that when the Courts of any other country, *e.g.*, England, are called upon to determine such a case, they must try to decide it as an Italian Court would decide it; but if an English Court has to decide a case as if it were sitting in

(o) *Ibid.*, p. 612.

(p) This case illustrates the fact that where English Courts hold that a question must be determined in accordance, *e.g.*, with the law of Italy, the term *renvoi* includes two different things:

(1) The sending back by Italian law, or Courts, of the question for decision by the law of England (*renvoi* or remittal).

(2) The sending over of the question for decision by the law of some country which is neither England nor Italy, *e.g.*, Switzerland (*renvoi* or transmission).

Whether the *renvoi* be used in the one sense or the other, the aim of the English Court is to apply the law which Italian Courts hold applicable to the case.

Italy, it follows that the English Court must take account of the whole law of Italy, including Italian rules of private international law.

(3) We reach the same result if, looking at the matter under discussion from another point of view, we consider the two courses which, under our law, are open to an English Court, or to the personal representatives of the deceased, when called upon to distribute the movable property in England of a person dying domiciled abroad, *e.g.*, in Italy (*q*). The Court may either hand over the distributable residue to the personal representative of the deceased under the law of his domicile, and leave to such representative the distribution thereof among the beneficiaries, or the Court may determine for itself who are the persons entitled under the law of the deceased's domicile to succeed to such distributable residue, and, having determined this point, distribute it among the persons thereto entitled in accordance with such law. Whichever course is adopted, the aim of the Court is to attain the same end; *i.e.*, the distribution of the deceased's property in accordance with the law of his domicile. Where the Court pursues the first course, and hands over the deceased's movable property to the persons representing him under the law of his Italian domicile, it is clear that such representatives must distribute it in accordance with whatever principles Italian law or, in other words, Italian Courts, may hold applicable to the case, including Italian rules of private international law. But when the English Court pursues the second course, and itself undertakes the duty of distributing the deceased's property, the Court intends to distribute the property in the same way in which it would be distributed had the property been handed over to the representative of the deceased under the law of Italy, *i.e.*, the English Court must distribute it in accordance with any principle, including Italian rules of private international law, which Italian tribunals deem applicable to the case.

(4) The soundness of the view here maintained is, it is submitted, confirmed by, or rather implied in the fact that our Courts treat as decisive and hold themselves bound by a judgment pronounced by the Courts of a country where a person dies domiciled as to succession to his movable property (*r*).

(B.) *Application of principle to given case.*

How, on the principle contended for in this note, would an English Court deal with the following case?

D is an Englishman; he is a British subject born in England,

(*q*) See Rule 192, p. 712, and pp. 713—715, *ante*.

(*r*) *In re Trufort* (1887), 36 Ch. D. 600; *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301. Conf. Westlake, s. 60, p. 114.

and has an English domicile of origin. He acquires an Italian domicile, and dies intestate domiciled in Italy. He leaves a large amount of movable property in England in the shape of money deposited at an English bank. *D*'s personal representatives apply to the High Court for directions as to the distribution of *D*'s English movable property. It is admitted on all hands (*s*) that such movable property must be distributed in accordance with the law of *D*'s domicile at the time of his death, *i.e.*, of Italy. We may, for the present purpose, assume that if such distribution follows the rules of Italian law, the case falls within the preliminary provisions of the *Codice Civile*, Art. 7. This in effect provides, subject to limitations with which we need not concern ourselves, that the distribution of *D*'s property is governed by the law of the nation to which *D* their owner belonged (*t*). Now here, be it noted, that as the English Court ought in this matter to act "as if it were a Court sitting in Italy," the duty (*u*) and the sole (*x*) duty of an English judge (whether the duty be hard or easy to perform) is to ascertain the meaning of that part of Italian law which Italian tribunals deem applicable to *D*'s case. The provisions, however, of the Italian Code are ambiguous.

1st. Art. 7 may, as interpreted by the Italian Courts, mean that *D*'s property is to be distributed in accordance with the local or territorial law of England. If this is the meaning of the Article, an English Court can have no difficulty in giving effect to it. It will distribute *D*'s property in accordance with the Statute of Distributions.

2nd. Art. 7 may, as interpreted by the Italian Courts, mean that (the whole law of England, including English rules of private international law, being taken into consideration) *D*'s property should be distributed in accordance with the local law of his Italian domicile. If this be the ascertained meaning of the Italian Code, as interpreted by the Italian Courts, an English judge is under no difficulty whatever. It matters not to him whether the construction which is placed by Italian Courts upon the Italian Code is logical or illogical. In the supposed circumstances, English Courts and Italian tribunals

(*s*) Subject to the new doctrine adopted *In re Bowes* (1906), 22 T. L. R. 711, that a domicile cannot be acquired in the teeth of foreign law. See p. 780, *post*.

(*t*) "Art. 7. I beni mobili sono soggetti alla legge della nazione del proprietario, salvo le contrarie disposizioni della legge del paese nel quale si trovano. "I beni immobili sono soggetti alle leggi del luogo dove sono situati."

(Conf. Arts. 6 and 9.)

(*u*) Assuming of course that there is nothing in the rules of Italian law governing the succession to an Englishman who dies intestate domiciled in Italy, which is prohibited by the law of England.

(*x*) *I.e.*, it is his duty to ascertain what the rules of Italian law embodied in the Italian Code do mean, as interpreted by Italian Courts, without troubling himself with any question as to what they ought to mean. Contrast Westlake, pp. 31—37.

hold, though it may be on different grounds, that succession to the movables of the deceased is governed by the ordinary territorial law of Italy (*y*).

Here, however, it is argued, we are met by an insuperable difficulty. English Courts, on the one hand, hold that succession to *D*'s property must be governed by the law of *D*'s domicile (Italy), *i.e.*, by the whole law of Italy, including Italian rules of private international law, and Italian tribunals, on the other hand, that it must be governed by the law of the country to which *D* belonged by nationality (England), *i.e.*, by the whole law of England, including English rules of private international law. Hence arises, it is said, a sort of game of legal battledore and shuttlecock, the case being eternally passed backwards and forwards by the Courts of England and of Italy for decision by the law of the other country, whence the effect that the case admits of no decision whatever. The plausibility of this paradox arises from the omission to consider that all which an English judge needs to do is to ascertain as a matter of fact what is the law of Italy with regard to the movables of a deceased person in the position of *D*, and then deal exactly as an Italian judge sitting in an Italian Court would deal with them. If *D* leaves movable property in Italy there is obviously no difficulty in ascertaining on what principle Italian Courts in fact deal with such property. But even if *D* has left no property there, it can hardly be impossible to ascertain how the Italian Courts would have dealt with property that he might have left in Italy; the difficulty, great or small—and it sometimes may be considerable—is simply that of ascertaining what is the law of a foreign country on a point which admits of difference of opinion.

3rd. It is possible that the meaning of Art. 7 is that the Italian Courts decline to exercise jurisdiction in respect of the movable property of a man dying domiciled in Italy, but not possessing Italian nationality. This is possible, but in the highest degree unlikely (*z*).

(*y*) This is the rule laid down in the *Einführungsgesetz* to the German Civil Code (in force from January 1st, 1900), Article 27.

(*z*) We refer to the possibility, because it seems to be contemplated in *Roberts v. Attorney-General, In re Johnson*, [1903] 1 Ch. 821, and to form one of the grounds of decision in that case. There was, however, no good reason for supposing that the Baden Court "in effect disavowed [the deceased] and disclaimed "jurisdiction." (*Ibid.* p. 828.) In this instance it would appear that the deceased did leave property in Baden. If the English Court had pressed its inquiries a step further than it did, and obtained information as to the way in which the Baden Court did deal with the movable property of the deceased which was situate in Baden, the English Court, acting on the principle that it ought to act as though it were a Court sitting in Baden, might, without difficulty, have distributed the movables in England in the same way in which the movables in Baden were distributed.

Assume, however, that the meaning of the Italian Code as interpreted by Italian Courts, is that in the case under consideration the Italian Courts must decline to exercise jurisdiction. There is no doubt that a real difficulty then arises. An English Court might, in this case, apply its own principle in one of two ways. It might, the matter being referred back to the decision of an English Court, hold that *D* being in fact domiciled in Italy, and the Italian Courts declining to have anything to do with the matter, his property should be distributed in accordance with the territorial law of Italy, and this probably might be the best solution. The English Court might, however, hold that, as the Courts of the domicile would decide nothing, *D*'s movables in England should be distributed in accordance with the law of the domicile last possessed by *D* before settling in Italy.

A complication in the doctrine of *renvoi* is, however, introduced in those cases in which the testator, who dies domiciled in a foreign country which adopts nationality as the basis of intestate succession, is a national of a State composed of parts possessing distinct systems of private law. It was this fact apparently which led to the decidedly ambiguous judgment delivered in the case of *In re Johnson (a)*. A testatrix, whose domicile of origin was Maltese, died domiciled, in the view of English law, in the Grand Duchy of Baden. She omitted, however, in her will to dispose of certain property in England, and the question of its due distribution came before the English Court. It was found that according to the law of Baden the legal succession to the property of the deceased of which she had not disposed by will was governed solely by the law of the country of which she was a subject at the time of her death. It was held by Farwell, J., that in these circumstances the property fell to be distributed according to the law of Malta. The decision may be supported, consistently with the doctrine of *renvoi*, on the ground (*b*) that the law of Baden was held to require that the matter should be decided in accordance with the national law of the deceased; that such national law was English law, being the true national law of every British subject; and that English law referred the decision to Maltese law as the appropriate branch of private law within the British Empire. The view was, however, also suggested that the domicile acquired in Baden in the eyes of English law must be regarded as ineffectual, since the law of Baden did not afford it any influence on the distribution of the movable property of an intestate, so that the deceased must be regarded as

(a) [1903] 1 Ch. 821. Compare *Simmons v. Simmons* (1917), 17 S. R. (N. S. W.) 419.

(b) *Ibid.* 832—835. Cf. p. 669, note (*p*), *ante*.

having retained her domicile of origin. This view, which would largely do away with the doctrine of *renvoi*, has been adopted in a subsequent case (c), in which a domicile acquired according to English law in France was held to be nullified by the fact that it had not been acquired in the manner provided by French law. It may be doubted whether this doctrine can be regarded as satisfactory or as consistent with authority (d). But the decision illustrates the plain truth that, independently of speculative questions about the doctrine of *renvoi*, or the meaning of the term "law of a country," problems (e) hard to solve will inevitably arise as long as the Courts of many countries hold that a man's personal law is determined by his nationality, whilst the Courts of many other countries hold that his personal law is determined by the law of his domicile.

The principles laid down in this Note hold good in cases which have no reference whatever to succession, *e.g.*, to cases with regard to the validity of a divorce. *H* and *W*, his wife, are domiciled in New York. They are divorced by a Court of the State of South Dakota, where they are not domiciled. The divorce, however, it is proved, would be recognized as valid by the Courts of New York. English tribunals, though maintaining that divorce jurisdiction depends, at any rate as regards its extra-territorial effect, upon domicile, treat the South Dakota divorce as valid, *i.e.*, the English Divorce Court in this instance considers that the validity of divorce depends upon the "law of New York," where the parties are domiciled, in the widest sense

(c) *In re Bowes* (1906), 22 T. L. R. 711.

(d) See *Bremer v. Freeman* (1857), 10 Moore, P. C. 306, 374; *In re Martin, Loustalan v. Loustalan*, [1900] P. (C. A.) 211, 227, cited p. 120, *ante*. In *Collier v. Rivaz* (1841), 2 Curt. 455, it was held that for purposes of succession a domicile could be obtained in Belgium, though the person concerned had not obtained the governmental authorization requisite under the Code Napoléon for the acquisition of a Belgian domicile proper. In *Anderson v. Laneville* (1854), 9 Moore, P. C. 325, it was similarly decided that a domicile could be obtained in France, without governmental authorization, which must be treated as effective for purposes of succession, and this decision was deliberately approved and followed in *Bremer v. Freeman*. The whole question was elaborately discussed in *Hamilton v. Dallas* (1875), 1 Ch. D. 257, and the same result arrived at. See also *In re Brown-Séguard* (1894), 70 L. T. 811. In the report of *In re Bowes* (1906), 22 T. L. R. 711, no mention is made of these cases, which also do not appear to have been cited in *In re Johnson*, [1903] 1 Ch. 821. It is difficult to suppose that the decision *In re Bowes* would have been arrived at if the authorities in question had been brought to the notice of the Court. It also appears clear from the report that there was a general desire on the part of all concerned in the case that the will under discussion should be dealt with by English law, and that the testators should be found to have died domiciled in England. No great value, therefore, can be attached to the decision in this case.

(e) The difficulty of these problems is increased by the occasional failure of foreign jurists and tribunals to perceive that nationality or allegiance cannot be made the criterion of the personal law to which a man is subject who is a member of a State, such as the British Empire, which consists of many countries, *e.g.*, England, Scotland, and Canada, each of which possesses a different system of law. As to succession there exists no national law applicable to every British subject.

of that term, and acts as it would if it were a Court sitting at New York (f). The principles further laid down in this Note apply to cases which must be determined by reference to some other law than the *lex domicilii*, e.g., by reference to the *lex situs*. A British subject probably, but not certainly, domiciled in England, was possessed of land in Egypt. He died leaving a will valid in form according to the law both of England and of Egypt. His Egyptian land was sold by his executors. The proceeds (16,000*l.*) were lodged in a bank in England. The dispositions of the deceased's will were valid according to the law of England, but invalid according to the local or territorial law of Egypt. It was admitted on all hands that the right of succession to the 16,000*l.* depended on the right to succession to the Egyptian land. But succession to land is under the Egyptian Code Civil, Arts. 77, 78, "governed by the law of the nation to which the "deceased belongs" (g). The meaning of the article was disputed. The evidence of experts was taken: it was by this means proved that the Egyptian Courts would hold that in the circumstances of the case succession to the deceased must, under the articles of the Egyptian Code, be governed by the ordinary territorial law of England. The will was held valid (h).

So, also, the English Court will appoint a guardian for an English child if a foreign Court entrusts this duty to the Court of the child's nationality (i).

NOTE 2.

LAW GOVERNING ACTS DONE IN UNCIVILIZED COUNTRIES.

The Rules in this Digest apply only to rights acquired under the laws of a civilized country. What, however, is the law, if any, which in the opinion of English Courts governs transactions taking place in an uncivilized country, e.g., in Afghanistan or Thibet, or at any rate in a country the institutions of which are utterly foreign to the institutions and habits of life in the admittedly civilized countries of the world (k)?

(f) Compare Rule 99, p. 420, and Exception, p. 422, *ante*.

(g) "Les successions sont réglées d'après les lois de la nation à laquelle "appartient le défunt." (Art. 77.)

(h) *In re Baines* (unreported), decided 19th March, 1903, by Farwell, J. See also the Egyptian case *In re Dale* (cited and commented upon by Bentwich, Law of Domicile, p. 173). This case (*semble*) agrees with *In re Baines*, and not with *In re Goods of Torrey Grant* (1907), Law Mag. & Rev. 1909, p. 297, which applied the *lex situs* in an intestacy; p. 552, *ante*.

(i) *In re Willoughby* (1885), 30 Ch. D. (C. A.) 324, contrasted with *In re Bourgoise* (1899), 41 Ch. D. 310; p. 520, *ante*.

(k) See *In re Bethell, Bethell v. Hildyard* (1888), 38 Ch. D. 220; *Brinkley v. Attorney-General* (1890), 15 P. D. 76; *Companhia de Moçambique v. British South Africa Co.*, [1892] 2 Q. B. (C. A.) 358; [1893] A. C. 602, and the cases cited in the following notes.

The question is one which may at times come before an English Court; it is also one to which in the absence of decisions nothing like a final answer can be given; all that can be done is to note a few points as to the matter before us, on which it is possible to conjecture at any rate what would be the view taken by English Courts.

We may assume that the legal effect of a transaction taking place, *e.g.*, a contract made, in an uncivilized country could not come before an English Court unless one of the parties at least were the subject of some civilized State. Something, too, may depend upon the kind of right which a plaintiff in an action in England may try to enforce before an English Court. There is in itself no reason whatever why two Englishmen, or an Englishman and a Frenchman, should not, whilst travelling in a country which might fairly be called uncivilized, make a contract to be performed between them in England or in France. There may, on the other hand, be very fair reason for supposing that an Englishman and an Englishwoman did not intend to change their English domicile and to marry and live under the law of some uncivilized country, *e.g.*, Afghanistan.

(1) *As to domicile*.—It has been suggested (*l*) that the settlement in an uncivilized country does not of itself change the domicile of a citizen of a civilized country. But this suggestion cannot now be regarded as laying down any absolute rule of law; all that can fairly be held is that the physical settlement, *e.g.*, of an Englishman (*D*) in an uncivilized country, the habits and laws of which are completely foreign to the institutions of England, affords much less proof of *D*'s intending to settle in, and fall under the laws of, such country than would his permanent change of residence from England to, *e.g.*, Italy or France (*m*).

(2) *As to marriage*.—A marriage made in a strictly barbarous country between British subjects, or between a British subject and a citizen of a civilized country, *e.g.*, an Italian, and it would seem even between a British subject and a native of such uncivilized country, will, it is submitted, be held valid as regards form, if made in accordance with the requirements of the English common law; and it is extremely probable that, with regard to such a marriage, the common law might now be interpreted as allowing the celebration of a marriage *per verba de præsenti* without the presence of a minister

(*l*) *In re Tootal's Trusts* (1883), 23 Ch. D. 532, 534, judgment of Chitty, J., citing *The Indian Chief* (1801), 3 Rob. Ad. Cas. 29, *per* Lord Stowell; *Maltass v. Maltass* (1844), 1 Rob. Ecc. Cas. 67, 80, 81, *per* Dr. Lushington. See also *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431.

(*m*) See *Casdagli v. Casdagli*, [1919] A. C. 145, in which the earlier cases cited above are exhaustively reviewed and criticised.

in orders (*n*). A local form (*o*), also, if such there be, would seem to be sufficient, at any rate where one of the parties is a native. It is, however, essential that the intention of the parties should be an intention to contract a "marriage" in the sense in which that term is known in Christian countries, *i.e.*, the union of one man to one woman for life to the exclusion of all others (*p*). Capacity to marry would apparently depend upon the law of the domicile of the parties (*q*).

(3) *As to contract*.—Capacity (*r*) to contract must, it would seem, depend upon the law of the domicile of the parties to the agreement. If either of the parties were under an incapacity by the law of his domicile to enter into a contract, an agreement made by him in an uncivilized country would probably not be enforceable against him in England. This we may be pretty certain would be the case were the party under an incapacity an English infant domiciled in England.

The formalities of a contract probably, and its effect almost certainly, would, under the circumstances supposed, be governed by the proper law of the contract, *i.e.*, by the law contemplated by the parties. Suppose *X* and *A* enter into a contract in Afghanistan. If the contract is to be performed in England, the incidents would be governed by English law; whilst, if it is to be performed in Germany, its incidents would be governed by German law (*s*).

(4) *As to alienation of movables*.—If the movables are at the time of the alienation situate in the barbarous country, probably English Courts might hold that the alienation must, in order to be valid, be one which, if made in England, would be valid according to the English common law. There is little doubt that if, though the alienation takes place in an uncivilized country, the movables alienated are situate in a civilized country, the validity of the alienation would depend on the law of that country (*lex situs*) (*t*).

(5) *Torts*.—When an act which damages *A* or his property is done by *X* in a barbarous country, the character of the act cannot depend on the law of the country where it is done. If both *X* and *A* are domiciled in England, the act is probably wrongful and actionable in England, if it would have been tortious if done in England. If the

(*n*) Compare *Reg. v. Millis* (1844), 10 Cl. & F. 534, and *Culling v. Culling*, [1896] P. 116, with *Catterall v. Catterall* (1847), 1 Rob. Ecc. 580, and Wharton (3rd ed.), s. 172, p. 372, note 2; *Armitage v. Armitage* (1866), L. R. 3 Eq. 343; *Lightbody v. West* (1902), 87 L. T. 138.

(*o*) See Rule 182, p. 661, and Rule 159, p. 583, *ante*.

(*p*) *Brinkley v. Attorney-General* (1890), 15 P. D. 76, contrasted with *Bethell v. Hildyard* (1888), 38 Ch. D. 220.

(*q*) See *Sottomayor v. De Barros* (1877), 3 P. D. (C. A.) 1; (1879), 5 P. D. 94; *Ogden v. Ogden*, [1908] P. (C. A.) 46.

(*r*) See Rule 158, p. 577, *ante*.

(*s*) See Rules 160, 161, pp. 588, 602, *ante*.

(*t*) See Rules 152, 153, pp. 561, 535, *ante*.

two parties are domiciled, the one in England and the other, *e.g.*, in Germany, then the act is probably actionable in England, if it be one which is wrongful both according to the law of England and according to the law of Germany. But we can here be guided by nothing but analogy, and all we can do is to consider how far the rules which govern the possibility of bringing an action in England for a tort committed in a foreign and civilized country (*u*) can by analogy be made applicable to an action for a tort committed in an uncivilized country. An action cannot be maintained in England for a trespass to land in an uncivilized country (*x*).

(6) *Procedure*.—An action in England in respect of any transaction taking place in an uncivilized country is clearly, as regards all matters of procedure, governed by English law (*y*).

On most of the points, however, considered in this Note, and many others which might suggest themselves, we must trust wholly to conjecture, and must admit that what is the law, if any, governing transactions taking place in an uncivilized country, is in many instances a matter of absolute uncertainty. If, for example, *X*, an Englishman domiciled in England, whilst in an uncivilized country promises *A*, a Scotsman domiciled in Scotland, out of gratitude for some past service, to pay *A* 10*l.* on their return home, is the promise governed by English law, and therefore invalid for want of a consideration, or by Scottish law, under which it may be valid? How, again, if the position of the parties had been reversed, and the promise had been made by *A*, the Scotsman domiciled in Scotland, to *X*, the Englishman domiciled in England? To these and similar inquiries no certain reply is, it is conceived, possible.

NOTE 3.

CASE OF *KAUFMAN* v. *GERSON* (*z*).

A, who is a Frenchman domiciled in France, brings an action in the High Court against *W*, a Frenchwoman, married to *H*, a Frenchman, also domiciled in France, for 100*l.* due from *W* to *A* under a contract to pay *A* a sum of 900*l.* The contract is entered into in France; has no reference to the law of England, and is, from the nature of things, performable in France. The consideration for the

(*u*) See Rules 187—189, pp. 694—696, *ante*.

(*x*) *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602.

(*y*) See Rule 203, p. 761, *ante*.

(*z*) See [1904] 1 K. B. (C. A.) 591; 73 L. J. K. B. 320; and 20 L. Q. R. (1904), pp. 227—229. Compare *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.* (1921), 37 T. L. R. 777, 783.

contract is, that *A* agrees with *W* not to prosecute *H* for a criminal offence actually committed by *H*. The contract is, by French law, legal. *A* has abstained from prosecuting *H*, and *W* has, under the contract, paid him 800*l*. She, now being in England, refuses to pay him the balance of 100*l*. *W* contends that the contract cannot be enforced in England, and counterclaims for the repayment of the 800*l*. Wright, J., gives judgment for *A* on the claim and counterclaim. His judgment is reversed by the Court of Appeal. Mr. Justice Wright's judgment is based on the broad principle that where a contract is not invalid by the law of the country where it is both made and is to be performed, an action is maintainable upon it; *i.e.*, it is to be held valid in England. The judgment of the Court of Appeal is based upon the equally broad principle that an English Court will not enforce a foreign contract, though valid by the law of the country in which it is made, where the Court deems the contract to be in contravention of some essential principle of justice and morality, or to use the language of Westlake, that "where a contract conflicts with what "are deemed in England to be essential public or moral interests, it "cannot be enforced here, notwithstanding that it may have been "valid by its proper law" (*a*). Each principle is sound. The question for consideration is, whether the principle relied upon by the Court of Appeal was properly applied? On this point it is possible to entertain grave doubt.

1. The view of the Court avowedly was that *W* was induced to enter into the contract with *A* under coercion or duress. But was this really the case? The ordinary cases of coercion are cases in which one person, by *unlawful* physical or moral pressure (*b*), compels another to give him money, or to enter into a contract, or where a highwayman compels a traveller, at the point of the pistol, to give up his purse or to sign a cheque for 1,000*l*. in the highwayman's favour. But *A* did a lawful act, whereby he induced *W*, for a lawful consideration, to enter into a lawful contract. This is a different thing from coercion.

2. There was admittedly a contract between *A* and *W*, and a contract lawful according to the law of France. The real objection to the contract on the part of the Court of Appeal was that the consideration, namely, *A*'s agreement to abstain from the prosecution of *H*, involved a violation of natural justice. This is, at least, doubtful. *W* prefers the payment of 900*l*. to the prosecution of her husband, *H*. She obtains, by paying the money, a real and indubitable advantage.

(*a*) Westlake, s. 215, p. 308.

(*b*) See *Société des Hôtels Réunis v. Hawker* (1913) 29 T. L. R. 578; (1914), 30 T. L. R. (C. A.) 423.

She would, in all likelihood, have deeply regretted to find that the law of France made it impossible for her to save her husband's character by agreeing to pay 900*l*. Why, then, is she any more coerced than is any party to a contract who is compelled to pay a large sum because he ardently desires to obtain a particular advantage?

3. The Court of Appeal must have held that the law of France ought not to have sanctioned a bargain such as that made between *A* and *W*. This idea underlies the Court's judgment, but it is at best an idea of dubious truth. French civilization and morality are as high as our own. The presumption should always be in favour of the justice of a French law; and, after all, there is no patent injustice in allowing a person to escape from criminal prosecution by making compensation to the sufferer whom he has damaged. Admit at once that English Courts are wise in discountenancing such arrangements as that between *A* and *W*. But as between the parties to the arrangement there need have been no unfairness therein.

4. There remains a more technical, but not a frivolous objection to the judgment of the Court of Appeal. In 1860 the Court of Exchequer Chamber (whose decisions are understood to be binding on the Court of Appeal) held that a contract for the sale of slaves, to be performed in Brazil, where slavery was then lawful, was enforceable in England (*c*). How is *Kaufman v. Gerson* to be reconciled with this? Are we to believe that compounding an offence is more obviously contrary to universal justice than slave-trading?

NOTE 4.

DECREASING INFLUENCE OF THE *LEX SITUS*.

From the time when Story published his *Conflict of Laws* (*d*)—up to, at any rate, 1840, the date of *Birtwhistle v. Vardill* (*e*)—English Courts held that every question with regard to land or immovable property wherever situate, and above all when it was situate in England, must be determined in accordance with the *lex situs*, which as regards England meant the local or territorial law of England.

This predominance of the *lex situs* has during the last eighty years been undermined, or limited by the recognition of several limitations thereto.

1. The natural meaning and effect of *Birtwhistle v. Vardill* has been cut down by judicial decisions or expressions of opinion.

(*c*) *Santos v. Illidge* (1860), 8 C. B. (N. S.) 861; 29 L. J. C. P. 348.

(*d*) Story, s. 424, and p. 542, *ante*.

(*e*) (1840), 7 Cl. & F. 895.

Birtwhistle v. Vardill, it is now all but certain, will be held to apply only to property which ultimately passes in the case of intestacy to the heir; it does not apply to any interest in land, *e.g.*, leaseholds which can be brought within the class of personal property or estate: it does not apply to freehold property which devolves under a will upon a person who, being born out of wedlock, cannot be the "heir" (*f*) to English land, but who, being legitimated by the subsequent marriage of his parents, takes English real estate under a devise to children (*g*). In other words, the rule laid down in *Birtwhistle v. Vardill* is interpreted as relating only to the case of descent upon an intestacy, and does not affect a devise of real estate to children (*g*). It is further probable that the rule in *Birtwhistle v. Vardill* does not apply to the case in which a person claims real estate under a settlement whereby the estate passes to persons designated as children of a predecessor.

2. Under the Wills Act, 1861 (Lord Kingsdown's Act), English leaseholds, or rather any interest in English land which is not freehold, may pass under a will which does not comply with the formalities required by the Wills Act, 1837 (*h*).

3. A marriage between persons domiciled in a foreign country and made subject to the law of such country, *e.g.*, France, operates, or at any rate may possibly operate, as an assignment of English land (*i*).

4. The British Nationality and Status of Aliens Act, 1914, s. 17, makes it possible for an alien to hold "real and personal property of every description" in the United Kingdom (*k*).

NOTE 5.

PREFERENCE OF ENGLISH COURTS FOR *LEX LOCI CONTRACTUS*.

It is laid down in the foregoing pages that a contract is often governed, not by the law of the place where it is made (*lex loci contractus*), but by the law of the place where it is to be performed (*lex loci solutionis*) (*l*). The reports, however, and text-books of authority, reiterate the maxim that a contract is governed by the law of the place where it is made.

(*f*) See Rule 146, pp. 521, 522, and pp. 527—531, *ante*.

(*g*) *In re Grey's Trusts*, [1892] 3 Ch. 88; and see p. 531, *ante*.

(*h*) See pp. 725, 729, *ante*.

(*i*) See pp. 553—556, *ante*.

(*k*) See Rule 51, p. 207, *ante*, as to this rule and the restrictions imposed upon it by recent legislation.

(*l*) See Rule 161 and Sub-Rules thereto, pp. 602, 606—609, *ante*.

The apparent contradiction between these statements is little more than verbal, and may be explained by the history of English judicial legislation with regard to the conflict of laws.

English judges, when, about a century and a half ago, they were for the first time called upon to deal frequently with the conflict of laws, no doubt conceived that matters of form, matters of substance, and, in short, everything connected with a contract, except matters of procedure, were governed by the *lex loci contractus*, and these words they interpreted as meaning "the law of the place where the contract was made." The adoption of a formula which they somewhat misinterpreted has influenced to a limited degree the substance of their decisions, especially with regard to the validity of a marriage (*m*). It has still more influenced the language in which English judgments have been and are expressed. For English Courts soon found it necessary, when interpreting contracts which contained in them some foreign element, to give effect to other laws besides the law of the place where the contract was made, and especially, as regards the mode of performing a contract, to the law of the place of performance (*lex loci solutionis*). This change of doctrine was, as often happens in the case of judicial legislation, combined with verbal adherence to an old formula not really consistent with the new theory. The expression *lex loci contractus* was retained, but was re-interpreted so as to mean "not the law of the country where a contract was made," but the "law of the country with a view to the law whereof a contract was made" (*n*). This law may be the law of the country where a contract was made, but may, it is manifest, be the law of some other country, and is very frequently the law of the country where the contract is to be performed. The same result was sometimes attained by another method of reasoning. It was laid down that a person must be assumed to have contracted at the place where his contract was to be performed. By either method of interpretation an actual reference to the law contemplated by the parties, which was more often than not the *lex loci solutionis*, was masked, as it still often is in English decisions and text-books, under a nominal reference to the law of the place of the contract. The substitution of the law of the place of performance (*lex loci solutionis*) for the law of the place where a contract was made (*lex loci celebrationis*) was the easier, because, in the vast majority of instances, persons intend that their contracts shall be performed in the country where they are made. The law, therefore, governing a contract may often, with almost equal propriety, be described as the *lex*

(*m*) See Rule 182, p. 661, *ante*.

(*n*) For the transition from the older to the later and more correct doctrine, see *Rothschild v. Currie* (1841), 1 Q. B. 43, 49; *Allen v. Kemble* (1848), 6 Moore, P. C. 314, 322, with which compare Story, ss. 242, 263, 272, 282, 314, 315..

loci solutionis or the *lex loci celebrationis*. The adherence, however, to the term *lex loci contractus* has produced two effects. It has, till comparatively recent years, concealed from English lawyers the principle that the interpretation, as contrasted with the formal validity, of a contract is governed not by the law of the place where the contract is made, but by the law (of whatever country) contemplated by the parties, and that this law is constantly the *lex loci solutionis*. It has, further, led English judges to give a preference to the law of the country where a contract is made. Where the law governing the incidents of a contract is doubtful, our Courts fall back upon the law of the place where a contract is made (*lex loci contractus*), whilst foreign jurists, it would seem, tend to fall back on the law of the place where the contract is to be performed (*lex loci solutionis*). Both English judges and foreign Courts or writers, however, in fact, adopt one principle, though they apply it somewhat differently (o). This is that the interpretation of a contract and the obligations arising under it are, in so far as they depend on the will of the parties, to be determined in accordance with the law contemplated by the parties.

There is, further, traceable in the Courts of every country a more or less unconscious tendency to settle any new or undecided point of law which is brought before them in accordance with the law of the country to which the Courts belong. The rule of English law is that any difference between English and foreign law must be averred and proved by the party who relies upon it, and in the absence of such proof it is assumed that English law is applicable (p).

NOTE 6.

DEFINITION OF DOMICIL.

I. DEFINITION PROPOSED IN THIS TREATISE.

A person's home or domicile, in so far as it is not determined by a direct rule of law (q), is here defined as the place or country either (i) in which he in fact resides with the intention of residence, or (ii) in which, having so resided, he continues actually to reside, though no

(o) *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; 212, language of Lord Watson.

(p) See *Brown v. Gracey* (1821), Dow. & Ry. N. P. 41 n.; *In re Adam* (1837), 1 Moore, P. C. 460; *Smith v. Gould* (1842), 4 Moore, P. C. 21; *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115, 129; *Nouvelle Banque de l'Union v. Ayton* (1891), 7 T. L. R. 377; *Simon v. Phillips* (1916), 85 L. J. K. B. 657; *R. v. Naguib*, [1917] 1 K. B. 359.

Foreign law must be proved as a fact in each case in which it is invoked, but the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), s. 15, provides that any question as to the effect of the evidence given as to foreign law shall be decided by the judge alone.

(q) Compare Rule 1, p. 83, *ante*, and p. 85, *ante*.

longer retaining the intention of residence (*animus manendi*), or (iii) with regard to which, having so resided there, he retains the intention of residence (*animus manendi*), though he in fact no longer resides there; or (using the word "abandon" in the strict sense given it throughout these pages) as the place or country in which a person resides with the *animus manendi*, or intention of residence, or which, having so resided in it, he has not abandoned (*r*).

Any one who bears in mind the explanations of the terms "residence" and "*animus manendi*" given in this treatise will perceive at once that the proposed definition lays no claim to originality, but is simply an attempt to render into somewhat precise terms definitions which have been already in substance suggested by authors of eminence, such as Savigny, Story, and Phillimore. He will also perceive that this definition, in common with most of the received definitions of the term "domicil," leaves out of account the cases in which a domicil is directly created by operation of law. This omission is intentional. To define "domicil" when created by operation of law would be simply to enumerate the cases in which rules of law create what may be termed conventional domicils. These rules cannot easily be reduced to a simple formula, and the attempt to enumerate them under a general definition of "domicil" would needlessly embarrass the admittedly difficult attempt to explain the meaning of "domicil" as created by or dependent upon a person's own act. It is well, however, to bear in mind that definitions of "domicil" do not in general include cases of domicil created by operation of law, and that with such cases this Note has no concern.

II. OTHER DEFINITIONS COMPARED.

(A) *Definition of Roman Law*.—"In eodem loco singulos habere "*domicilium non ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit discéssurus, si nihil avocet, unde cum profectus est peregrinari videtur, quo si rediit peregrinari jam destitit*" (*s*).

This celebrated definition is, as has been remarked (*t*), not so much a logical definition as a rhetorical description of a home. The "place" to which it applies is rather a house than a country, and its terms cannot be so twisted as to suit the domicil known to English lawyers. It includes, however, the essential constituents of a home, viz., residence and the *animus manendi*, and has the further merit of covering the cases in which domicil is retained without actual residence.

(*r*) See pp. 85—87, *ante*.

(*s*) Cod., lib. X., tit. xxxix. 7.

(*t*) See *Lord v. Colvin* (1859), 28 L. J. Ch. 361, 365, judgment of Kindersley, V.-C.

(B) *Vattel's Definition*.—Domicil is “an habitation fixed in some place with an intention of remaining there always” (u).

As remarked by Story, this definition is improved by substituting for the latter part of it the expression “without any present intention of removing therefrom” (x); but even with this amendment it hardly covers the case where a domicil once acquired is retained, either by actual residence after the *animus manendi* has ceased to exist, or by the intention to reside after actual residence has come to an end.

(C) *Denizart's Definition*.—The domicil of the person is “the place where a person enjoys his rights, and establishes his abode, and makes the seat of his property” (y).

(D) *Pothier's Definition*.—“The place where a person has established the principal seat of his residence and of his business” (z).

(E) *Definition of French Code*.—“Le domicile de tout Français, quant à l'exercice de ses droits civils, est au lieu où il a son principal établissement” (a).

(F) *Definition of Italian Code*.—“Il domicilio civile di una persona è nel luogo in cui essa ha la sede principale dei propri affari ed interessi.

“La residenza è nel luogo in cui la persona ha la dimora abituale” (b).

These definitions rather lay down a rule of evidence for determining what is the place where a person is to be considered to have his domicil than define the meaning of the term. They belong to a system of law which determines a person's legal home by the existence of some one fact, such as his carrying on business in a particular place. There is much to recommend this mode of fixing a person's legal home, but it is not adopted by our Courts. The Italian definition coincides, it may be noticed, with the definition propounded in this treatise, in so far as it bases the description of “domicil” upon the definition of residence, and, further, defines residence itself in terms not very unlike those employed in this treatise (c).

(G) *Savigny's Definition*.—“That place is to be regarded as a man's domicil which he has freely chosen for his permanent abode [and thus for the centre at once of his legal relations and his business]” (d).

This definition brings into prominence exactly the point neglected

(u) Vattel, *Droit des Gens*, liv. i., c. xix., s. 218, Du Domicile.

(x) See Story, s. 43.

(y) *Encyclop. Moderne*, Art. Domicil.

(z) Pothier, *Introd. Gén. Cout. d'Orléans*, ch. 1, s. 1, Art. 8.

(a) *Code Civil*, Art. 102.

(b) *Codice Civile del Regno d'Italia*, Tit. II. 16.

(c) See p. 84, *ante*.

(d) Savigny, s. 353, Guthrie's transl. (2nd ed.), p. 97.

by most writers, viz., the element of choice or intention. The words enclosed in brackets appear superfluous, since they point to a consequence of the place being a permanent abode.

The definition agrees in substance with that proposed in this work, but is too general in its terms to be of service to English lawyers, and though, if rightly understood, correct, might, at any rate as translated into English, mislead. For the expression "freely chosen," which probably only means that the residence might be a consequence of choice, whatever the motives for that choice, might give rise to the perplexities which have flowed from the use of the word "voluntary" (e); and the terms of the definition might be taken to imply (what is certainly not Savigny's intention) that an Englishman, who had made up his mind to emigrate to America and settle there, acquired an American domicile by his "free choice of America as a permanent abode" before he leaves England.

(H) *Story's Definition*.—"That place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom" (f).

This definition deserves particular attention, both from the celebrity of the author and from the influence it has had on English decisions. It may be considered to approach more nearly than any other to an approved or authorized description of "domicil" (g). It has the merit of pointing to the negative nature of the intention or purpose on which domicile depends. Taken with the explanations with which it is accompanied in Story's work, it forms by no means a bad description of "domicil," but Story himself probably did not intend to attempt (what he very rarely aims at) a precise definition. Looked at in that light, his language would not, it is submitted, be accurate. His words hardly include the case of an Englishman resident for years abroad, yet still retaining his English domicile. It could certainly not in ordinary language be said to be a habitation from which he had no intention of removing.

(I) *Phillimore's Definition*.—"A residence at a particular place, accompanied with [positive or presumptive proof of] an intention to remain there for an unlimited time" (h).

This definition is, except for the words printed in brackets, in substance the same as Story's. These words, however, might be with advantage omitted. They are at best superfluous, for the maxim *de non apparentibus et non existentibus eadem est ratio* is in law of

(e) See pp. 112—114, 150—154, *ante*.

(f) Story, s. 43.

(g) See, e.g., *Attorney-General v. Kent* (1862), 1 H. & C. 12, 21; 31 L. J. Ex. 391, 396, judgment of Martin, B.

(h) Phillimore, s. 49.

universal application, and a fact which cannot be proved to exist has, for legal purposes, no existence. They, moreover, tend to confuse together the inquiry, What is the nature of the fact constituting domicile, or, in other words, its definition? with the different question, What is the evidence by which the existence of this fact, when its nature is known, can be proved? It is, however, easy to conjecture what it is which has induced so distinguished a writer as Sir Robert Phillimore to introduce into his definition of "domicil" terms which are, to say the least, superfluous. They are apparently intended to cover the cases in which a person's domicile is determined by a fixed rule of law independently of his own act. The author of the definition probably considers that in such instances the rule of law may be best represented as a rule of evidence affording positive or presumptive proof that a person to whom a domicile is assigned in a particular country by operation of law is there domiciled.

(J) *Vice-Chancellor Kindersley's Definition*.—"That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home" (i).

This definition lacks precision, and does not accurately point out the conditions under which a domicile may be retained; still it has the great merit of fixing attention on the nature of the purpose or state of mind on which the acquisition or maintenance of a domicile depends.

The definitions of Savigny, Story, Phillimore, and Vice-Chancellor Kindersley, though framed with different degrees of precision, each define domicile by analyzing it into its essential characteristics, viz., residence, combined or connected with the intention of permanent residence or the *animus manendi*. They are each, it is submitted, consistent with each other and with the definition propounded in this treatise.

III. CRITICISMS ON ATTEMPTS TO DEFINE DOMICIL.

English judges have certainly not underrated the difficulty of defining the term "domicil." Their language, on the contrary, generally points to the two conclusions,—first, that a satisfactory definition of domicile is from the nature of things unattainable; and,

(i) *Lord v. Colvin* (1859), 28 L. J. Ch. 361, 366, *per* Kindersley, V.-C. See, for an unfavourable criticism on this definition, *Moorhouse v. Lord* (1863), 10 H. L. C. 272; 32 L. J. Ch. 295, 298, 299, judgment of Lord Chelmsford.

secondly, that, even if the term be definable, every attempt to obtain a serviceable definition has hitherto ended in failure.

Each of these opinions, with the grounds on which it is supported, deserves careful consideration.

The opinion that the word "domicil" does not admit of definition has been expressed by eminent judges in the following terms:—

"Domicil," it has been said, means "permanent home, and, if that was not understood by itself, no illustration would help to make it intelligible" (*k*). "Any apparent definition, such as a man's 'settled habitation,' or the like, would," it has been urged, "always terminate in the ambiguity of the word 'settled,' or its equivalent, depending for their interpretation on the intention of the party, which must be collected from various *indicia*" (*l*). "With respect to these questions of domicil, there is no precise definition of that word, or any formula laid down by the application of which to the facts of the case it is possible at once to say where the domicil may be" (*m*). "I find it," says another very eminent judge, "stated in Dr. Phillimore's book that Lord Alvanley commends the wisdom of a great jurist of the name of Bynkershoek in not giving a definition of [domicil], and certainly it is extremely difficult for any one to give a simple definition to that word" (*n*).

The opinion which these dicta embody is, however, in spite of the eminence of its supporters, one in which it is on logical grounds hard to acquiesce. To define a word is simply to explain its meaning, or, where the term is a complex one, to resolve it into the notions of which it consists. The only insuperable obstacles to definition would seem on logical grounds to be, either that a term is of so complex a nature that language does not avail to unfold its meaning (or, in other words, that the term is in the strict sense incomprehensible), or that it connotes an idea so simple as not to admit of further analysis. Neither of these obstacles can, it is conceived, hinder the definition of the term "domicil." It is certainly not the name of any notion so complex that it cannot be rendered into language. It is certainly, again, not the name for an idea so simple as not to admit of further analysis. The expression, for example, "permanent home," which is often used as its popular equivalent, is clearly a complex one, which needs and may receive further explanation.

Nor are the reasons suggested for holding that domicil is indefinable

(*k*) *Whicker v. Hume* (1858), 28 L. J. Ch. 396, 400, *per* Lord Cranworth. Compare *Moorhouse v. Lord* (1863), 32 L. J. Ch. 295, 298, language of Lord Chelmsford, and *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 449.

(*l*) *Forbes v. Forbes* (1854), 23 L. J. Ch. 724, 726, *per* Wood, V.-C.

(*m*) *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 731, *per* Kindersley, V.-C.

(*n*) *Attorney-General v. Rowe* (1862), 31 L. J. Ex. 314, 319, *per* Bramwell, B.

by any means conclusive. The objection often made in various forms, that any definition must terminate in the ambiguity of the word "settled" or its equivalent, may be a proof that the process of definition has to be pushed farther than it has hitherto been carried, but does not show either that definitions already made are, as far as they go, inaccurate, or still less that the attainment of a complete definition is impossible. The perfectly sound remark, again, that no formula can be laid down by the application of which to the facts of the case it is possible at once to say where a person's domicile may be points, not to any necessary defect in the definition of the term, but to the narrow limits within which definition, however perfect, can be of practical utility. Any term the meaning of which involves a reference to "habit" or to "intention" will always be difficult of application. No definition can ever remove the difficulty of determining in a particular case what number of acts make a course of action habitual, or what is the evidence from which we may legitimately infer the existence of intention. Difficulties similar in kind, if not in degree, to those which attend the application of any definition of domicile to the facts of the case arise whenever questions as to "possession" or as to "intention" require to be answered by the Courts. The peculiar difficulty of dealing with the term "domicil" arises, it is apprehended, from its being a term the meaning of which involves a reference both to habit and to intention; while the intention, viz., the *animus manendi*, is one of a very indefinite character, and as to the existence of which the Courts often have to decide without possessing the data for a reasonable decision.

The admission, in fact, that domicile depends on a relation between "residence" and "the intention of residence," or, to use the words of Lord Westbury, that "domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time" (o), is, it is conceived, a virtual concession that a definition of domicile is, at any rate, possible. When his lordship adds that "this is a description of the circumstances which create or constitute a domicile, and not a definition of the term," there is a difficulty in following his reasoning, for such a description, if accurate, is an explanation, or, in other words, a definition, of what is meant by domicile. It is, at any rate, the only kind of definition which a lawyer need care to frame.

The prevalent opinion that no attempt to define domicile has been

(o) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 458. And compare *Bell v. Kennedy* (1868), *ibid.*, 307, 319; *Cockrell v. Cockrell* (1856), 25 L. J. Ch. 730, 731, 732; *Lyall v. Paton* (1856), *ibid.*, 746, 749.

crowned with success deserves careful consideration. For, if the opinion be well founded, the conclusion naturally suggests itself that, where writers of great eminence have failed, success is practically unattainable, whilst the mere existence of the opinion in question appears, at first sight, to be something like a guarantee that it rests on sound foundations. Hence it is worth while to consider what are the grounds on which the belief that the existing definitions of domicile are unsatisfactory is based, and whether it be possible to find an explanation for the existence of this belief, which, without impugning the sagacity of those by whom it has been entertained, leaves its truth at least open to doubt.

English tribunals have tested every definition of domicile by what undoubtedly is, subject to one condition, the true criterion, at any rate in an English Court, of the soundness of such a definition, viz., whether it includes all the cases in which it has been judicially decided that a person has, and excludes all the cases in which it has been judicially decided that a person has not, a domicile in a particular country; and it is because judges have found that no received definition has stood this test, that they have pronounced every existing definition defective, and have all but despaired of the possibility of framing a sound definition. The condition, however, of the validity of this criterion is, that the cases by which a definition is tested should be really inconsistent with the definition, and that the cases themselves should be decided consistently with generally admitted principles. For if a definition is really applicable to cases which at first sight seem inconsistent with it, or if the decisions by which it is tested are themselves in principle open to doubt, the difficulty which arises in applying the definition is in reality a strong testimony to its essential soundness. The matter, then, for consideration is whether the test applied to the definitions of domicile has fulfilled the condition on which its validity depends.

Definitions of domicile have made shipwreck on three distinct sets of cases, which may, for the sake of brevity, be described as "Anglo-Indian Cases," "Allegiance Cases," and "Health Cases."

(A) *Anglo-Indian Cases* (*p*).—A series of decisions beginning, in 1790, with *Bruce v. Bruce* (*q*), and ending, in 1865, with *Jopp v. Wood* (*r*), decided that an officer in the service of the Company was domiciled in India. It was often clear that a servant of the Company did not intend to make India his permanent home (*s*). It was, there-

(*p*) See *Conflict* (2nd ed.), pp. 156—158.

(*q*) 2 B. & P. 229.

(*r*) 4 De G. J. & S. 616; 34 L. J. Ch. 212. See also *In re Tootal's Trusts* (1883), 23 Ch. D. 532.

(*s*) *Allardice v. Onslow* (1864), 33 L. J. Ch. 434, 436, judgment of Kindersley,

fore, impossible that any definition which made the existence of domicile depend on the *animus manendi* should justify the decisions as to Anglo-Indian domicile. No accuracy of terms or analysis of the meaning of the word could by any possibility achieve this result. As long, therefore, as the Anglo-Indian cases were held to be correctly decided, English judges were inevitably driven to the conclusion that every received definition of domicile, such, for example, as Story's, was incorrect. The Courts, however, have now pronounced the Anglo-Indian cases anomalous, or, in other words, have held that these cases were in principle wrongly decided, though their effect could now be got rid of only by legislative action (*t*). The Anglo-Indian cases, therefore, do not fulfil the condition necessary to make them a test of a definition of domicile (*u*).

(B) *Allegiance Cases* (*x*).—The doctrine was at one time laid down (*y*) that a change of domicile involves something like a change of allegiance, and that, for instance, an Englishman, in order to acquire a French domicile, must at any rate, as far as in him lies, endeavour to become a French citizen. This doctrine was strictly inconsistent with the theory, on which the received definitions of domicile are based, that a domicile is merely a permanent home. As long, therefore, as this doctrine was maintained, it was impossible for English judges to treat as satisfactory any of the current definitions of domicile. The attempt, however, to identify change of domicile with change of allegiance has now been pronounced on the highest authority a failure (*z*). The allegiance cases, therefore, are not entitled to weight, and are no criterion of the correctness of a definition of domicile.

(C) *Health Cases* (*a*).—Dicta, though not decisions, may be cited as showing that a change of residence made by an invalid for the sake of his health cannot effect a change of domicile. This doctrine, if

V.-C. It should, however, be noted that in the early days of the company many of their servants went to make India a permanent home, with but the faintest prospect of ever returning to settle in Europe, and that it seemed difficult to hold that such a man retained an English or Scottish domicile on the strength of a vague prospect at most of retiring on a competency. Later on the position changed, and the Anglo-Indian domicile became flatly anomalous. Compare the very instructive judgment in *Wauchope v. Wauchope* (1877), 4 R. 945.

(*t*) *Jopp v. Wood* (1865), 34 L. J. Ch. 212; 4 De G. J. & S. 616; *Drevon v. Drevon* (1864), 34 L. J. Ch. 129, 134. This kind of domicile no longer exists. See *Keyes v. Keyes* (1921), 37 T. L. R. 499.

(*u*) Compare *In re Tootal's Trusts* (1883), 23 Ch. D. 532, and *Abd-ul-Messih v. Farra* (1888), 13 App. Cas. 431, as also Westlake (5th ed.), s. 265, with *Casdagli v. Casdagli*, [1919] A. C. 145.

(*x*) See pp. 116, 117, *ante*.

(*y*) *Moorhouse v. Lord* (1863), 10 H. L. C. 272; 32 L. J. Ch. 295; *Whicker v. Hume* (1858), 7 H. L. C. 124; 28 L. J. Ch. 396.

(*z*) *Udny v. Udny* (1869), L. R. 1 Sc. App. 441, 452, judgment of Hatherley, Ch.; *Douglas v. Douglas* (1871), L. R. 12 Eq. 617.

(*a*) See pp. 153—156, *ante*.

adopted without considerable limitations, makes domicile depend upon the motive, and not upon the intention, with which a person changes his residence. It is, therefore, inconsistent with, and throws doubt upon, the correctness of any definition of domicile depending upon the combination of residence and *animus manendi*. The doctrine, however, is now shown by one case on this subject (*b*) to be either unfounded, or else to be explainable in a manner perfectly consistent with the ordinary definitions of domicile.

A result, therefore, of the examination of the three sets of cases by which definitions of domicile have been tested and found wanting is, that no one of these sets fulfils the conditions necessary to make it the criterion of a definition, and that the difficulty which has been found in reconciling several definitions with the Anglo-Indian cases, the allegiance cases, and the health cases, tells rather in favour of than against the correctness of the definitions, which, because they could not cover these cases, were naturally thought incorrect and unsatisfactory.

A survey, in short, of the attempts which have been made to define domicile, and of the criticisms upon such attempts, leads to results which may be summed up as follows:—

First. Domicile, being a complex term, must from the nature of things be capable of definition. In other words, it is a term which has a meaning, and that meaning can be explained by analyzing it into its elements.

Secondly. All the best definitions agree in making the elements of domicile “residence” and “*animus manendi*.”

Thirdly. Several of these definitions—such, for example, as Story’s, Phillimore’s, or Vice-Chancellor Kindersley’s—have succeeded in giving an explanation of the meaning of domicile, which, even if not expressed in the most precise language, is substantially accurate.

Fourthly. The reason why English Courts have been inclined to hold that no definition of domicile is satisfactory is, that they have found it impossible to reconcile any definition with three sets of judicial decisions or dicta. When, however, these sets are examined, it is found that two of them consist of cases embodying views of domicile now admitted to be erroneous, whilst the third set can be reconciled with all the best definitions of domicile. The great difficulty, in short, which English judges have experienced in discovering a satisfactory definition arises from the fact that, when of recent years the Courts have been called upon to determine questions of domicile, they have been hampered by the almost insuperable difficulty of reconciling a

(*b*) *Hoskins v. Matthews* (1856), 25 L. J. Ch. 689; 8 De G. M. & G. 13. Compare, however, *James v. James* (1908), 98 L. T. 438.

generally sound theory with decisions or dicta delivered at a period when the whole subject of the conflict of laws was much less perfectly understood than at present. They have, in short, tried to bring under one definition cases in which a person had really and in fact a permanent home or domicile in a given country, and cases in which, though a person had not in fact a domicile in a particular country, it was convenient by a rule of law to lay down that he was domiciled in a given country though in fact he had his permanent home or domicile elsewhere. Such, for example, may often be the case with a wife who is permanently resident in France though she is held by a rule of English law to be permanently resident or domiciled in England where her husband is domiciled, though she in fact neither resides nor intends to reside in England.

NOTE 7.

COMMON LAW VIEW OF ENGLISH NATIONALITY.

For the purpose of this Note, namely, the full understanding of the general effect produced by the British Nationality and Status of Aliens Act, 1914, which came into operation on the 1st January, 1915, it is worth while, first, to consider the common law view of British nationality as it existed under Edward III., somewhere about 1350, and, next, to examine from a very general point of view the extent to which the common law view of British nationality had been changed by statutory legislation before the Act of 1914 came into operation.

I. THE COMMON LAW DOCTRINE IN 1350.

English lawyers in the time of Edward III. based the law of what we should now call "British nationality" on one broad principle, which they firmly upheld both from its positive and from its negative side. Any person, they held, who was born within the ligeance of the King of England was a natural-born British subject, whilst, on the other hand, no person was such a natural-born British subject unless he was born within the ligeance of the King. The word "ligeance" is an expression foreign to any one except lawyers in the nineteenth century, but it had in the fourteenth century a very definite significance. It meant the duty of a King's subject to yield permanent obedience to the King, and his claim, in return for this obedience, to receive the King's protection. This doctrine, however, of allegiance received its real force and effect from an inference which to English lawyers, as indeed also to the lawyers of many European countries, seemed almost self-evident, namely, that a person born in any country

owed from his birth there allegiance to the ruler of such country, and this because he had a right by and from his birth, *e.g.*, in England, to receive the protection of the King of England. This positive doctrine was only the other side of the same belief that nobody could be the born subject of any monarch unless he were born within the limits of such King's dominions, *e.g.*, in the case of England, within the limits of England. Hence, too, a further conclusion, which was till quite recent times fully maintained by English lawyers, that a born subject of the King of England had neither the right nor, from a legal point of view, the power by his own act to depart from his allegiance to the King of England, nor had any man who was not a natural-born subject of the King of England, to claim on account of descent or otherwise to be within the allegiance of, or, in other words, the subject of, the King. It, of course, was the case, as they very early perceived, that a man might be made an English subject by legislation, or by what we should call a Naturalization Act of the English Parliament. It was also the case that the King could by his own act make a particular person an English subject, or at least give him by denization a position very nearly, though not entirely, the same as that of an English subject. To see the length to which the common law doctrine of what we should term naturalization was carried, it is well to note that at common law no person born in England or any other part of the British dominions could rightly become naturalized in any other country, and that this principle was upheld till 1870 (*c*). Marriage, moreover, was not recognized as in itself working any change in the national character of a woman, and hence till 1844 (*d*) an alien woman, *e.g.*, a Frenchwoman, who married a British subject, did not cease to be an alien, and, on the other hand, a British subject, who married an alien husband, *e.g.*, a Frenchman, did not till 1870, in the eye of English law, become an alien.

The point specially to be borne in mind is that the fundamental doctrine of the English common law with regard to nationality was that it originated in a man being born within the King's allegiance, or, to put the same fact in a more modern form, that a man's nationality depended, as it still does to a great extent depend, not upon his race or descent, but upon the country in which he happens to be born. Nor is it useless to insist that the same important principle may be expressed either in mediæval or in modern language. You may say and with substantial truth that a man is, or is not, a

(*c*) See *Fitch v. Weber* (1847), 6 Hare, 51; *Aeneas Macdonald's Case* (1747), 18 S. T. 857.

(*d*) 7 & 8 Vict. c. 66.

British subject as he is, or is not, born within the ligeance of the King, or that his being or not being a British subject depends, if we allow for a very few exceptions, on his being or not being born within the dominions of the King. One valid reason for keeping this point in view is that a change of feeling or of opinion, which may be traced back to at least as early as the beginning of the nineteenth century, has given rise to the opinion or sentiment that nationality ought to depend not upon the locality where a person is born, *e.g.*, whether he is born in England or in France, but upon his descent or race. This commonly received notion may embody some important truth, but it conceals from view the undoubted fact that under certain social conditions the rule which made a man an Englishman simply because he was born within the dominions of the English King, has certain great advantages, two of which are traceable throughout the whole course of English history. The fact that nationality in England depended upon a man's being born in England, prevented the growth in a country, which has received so many foreign immigrants, of large classes, *e.g.*, French Huguenots, living under different laws (*e*) from those which governed the majority of the English nation. It is even more clear that the common law doctrine of nationality, as interpreted by Coke, was a long step in the direction of creating a genuine and successful national union between England and Scotland. If anyone asserts that to make national unity depend on the place of a person's birth, instead of depending upon race or descent, shows a disregard for the moral considerations which underlie national unity, he does an injustice to English judges, who no doubt foresaw that, under forms of argument which were natural to them if less familiar at the present day, they were promoting the growth of Great Britain, and, as we now know, of the British Empire; and that there was, and is, a sound and a real moral connection between permanent obedience and loyalty to the Government under which you were born, and the right to receive protection against foes at home or abroad from the Government to whom you pay the tribute of loyalty. "Therefore it is truly said that *protectio trahit subjectionem et subjectio protectionem*" (*f*) was no unmeaning moral maxim.

II. THE MODIFICATION OF THE COMMON LAW DOCTRINE FROM 1350 TO 1914.

The details of this slow but systematic modification of an important branch of English law can best be studied by reading chap. xv. in

(*e*) It was not until the Naturalization Act, 1870, that for most purposes of civil law aliens were assimilated in position to British subjects.

(*f*) See especially *Calvin's Case* (1608), 7 Rep. 5a.

Westlake's *Private International Law*, and chap. iii. in the second edition of Dicey's *Conflict of Laws*, to which we have already referred our readers. But a general impression of this statutory transformation of the law as to nationality may be best attained, if we look at the matter from three standpoints, without much regard to limitations or exceptions which should be made the subject of special study.

First. The great extent to which the common law doctrine has remained unchanged.

Over 500 years have elapsed since the death of Edward III., yet the most fundamental rule of British nationality remains all but absolutely unchanged. It is still true that almost every person born within the King's dominions, or, to use ordinary expressions, within the British dominions, is a natural-born British subject. The exceptions to this rule were mainly known to mediæval lawyers, and were caused by the fact that occasionally a man might be born in England, *e.g.*, the son of an invading enemy, or the son of an ambassador sent to represent some foreign and friendly power, who could not, by any fair interpretation of terms, be considered a man born within the allegiance of the King of England. For practical purposes a teacher of law might well lay down the rule, that every person born in the British dominions is a natural-born British subject, without paying regard to its exceptions.

The rule, again, that no one born out of England was a natural-born British subject, still holds good of all the British dominions. The exceptions to it are numerous, but in 1914 they were less important than they are to-day. In plain truth it is a little difficult, as any one who writes on the subject will find, to separate from each other the cases in which English law has rigidly maintained the old doctrine about the acquisition of British nationality, and the cases in which parliamentary legislation has modified old rules which were unappropriate to the needs of the day. In the department of English law with which we are concerned, as in many other parts thereof, the conservatism of English innovators is at least as remarkable as their occasional boldness.

As an example in a very small matter of English adherence to existing rules in regard to nationality, take the fact which is indisputable, that British nationality may be inherited by, but certainly cannot be inherited through, a woman.

Second. The main changes of the common law doctrine before 1915.

By 1350, people had already become aware of the inconveniences which might spring from the fact that the child of English parents born, say, in France might under the law as it stood become an alien.

Before 1914 the right to inherit British nationality was extended to the children of a natural-born British father and to the grandchildren of a natural-born paternal grandfather. But note that this inheritance of British nationality was by the Courts themselves confined to two generations, so that, if *A* were a natural-born British subject born in England, *B*, his son, would be a natural-born British subject though born in Paris, and *C*, the grandson of *A*, would be a natural-born British subject though born in Paris. But *S*, the son of *C* and the great-grandson of *A*, would be an alien.

Note, further, that up to the end of 1914 the child of a naturalized British subject, if born out of the King's dominions, was certainly, if born before the father's naturalization, and probably if born after such father's naturalization, not a British subject (*g*).

Third. The way in which the common law doctrine as to nationality has affected the form in which the rules as to British nationality have been stated.

This is a point which has scarcely received the attention which it deserves.

Two examples will best explain the meaning of the fact which readers should certainly note.

Mediæval lawyers naturally stated the rules regulating British nationality with reference to the fact of a person's being or not being within the King's ligeance. Lawyers who lived later would, we should naturally have supposed, have stated the law as to the acquisition of British nationality by referring to the fact that whether a person was a British subject or an alien depended upon whether he was or was not born in the King's dominions. But in matter of fact they often in statutes describe nationality as depending on ligeance (*h*), though sometimes also as depending upon birth in the King's dominions (*i*).

It is worth noting that real exceptions to what now might seem to be the general rule as to the inheritance of British nationality are in British statutes hardly ever mentioned, as such. It is nowhere laid down, for instance, that a person born out of the King's dominions is not in general a British subject, or that British nationality is not inherited through women. The reason of this is that the common law rule is still kept in mind by English lawyers, and that exceptions thereto, as where a person born out of the King's dominions inherits British nationality, take the form of conferring nationality upon a

(*g*) See Dicey, *Conflict of Laws* (2nd ed.), p. 182.

(*h*) See, *e.g.* the British Nationality Act, 1730 (4 Geo. 2, c. 21), s. 1.

(*i*) See the British Nationality Act, 1772 (13 Geo. 3, c. 21), s. 1; the Naturalization Act, 1870 (33 & 34 Vict. c. 14), s. 4.

certain class of persons, though born abroad, *e.g.*, upon the children of all British subjects who were born in the British dominions. This matter becomes of some importance when one is called upon to construe the effect of the British Nationality and Status of Aliens Act, 1914. We must never forget that the fundamental principles of the common law are still in force, except in so far as they are repealed by statute.

NOTE 8.

INTERPRETATION OF THE BRITISH NATIONALITY AND STATUS OF ALIENS ACT, 1914, ESPECIALLY SECT. 1 (RULES 23—25).

The Act, and above all sect. 1, deserves the most careful study, and this for two reasons. The Act, in the first place, repeals the general enactments in respect to the acquisition, loss, &c. of British nationality, from the passing of the statute for those who are born in parts beyond the seas (25 Edw. 3, stat. 1, 1350) to the Naturalization Act, 1895 (58 & 59 Vict. c. 43). Hence the present Act of 1914 (*k*), taken together with the common law view as to British nationality, in so far as it is not affected by this Act, contains the whole law as to the acquisition and loss of British nationality, and also as to naturalization. It must, however, be borne in mind that now, as heretofore, British nationality may always be conferred upon any person by a special Act of Parliament, and that the King's power to make a man a denizen is not diminished by the British Nationality Act, 1914. The latter Act, in the second place, and especially s. 1 (*l*) thereof, is a summary of the principles governing the acquisition and loss of the character of a British subject, and the Act and this section present several difficulties as to construction and explanation.

A reader's perplexities are, indeed, caused in part by the draftsmanship of this Act, but they arise in the main from causes of a more general character, which require careful consideration from any reader who wishes to obtain anything like certainty as to the principles which now lie at the foundation of the existing law in reference to British nationality. These causes may be summed up under four heads.

First. Difficulties caused by the use of new or strange Forms of Expression.

One example best shows what is here meant. The framers of the

(*k*) Printed as amended in accordance with the British Nationality and Status of Aliens Act, 1918 (8 & 9 Geo. 5, c. 38). See also Rules 20—25, pp. 167—183, *ante*. For 35 & 36 Vict. c. 39, see p. 200, note (*n*), *ante*.

(*l*) See this section set out verbatim, p. 169, note (*l*), *ante*.

Act wished to lay down one of the best known and most certain principles of English law, namely, that among British subjects must be deemed any person born within the British dominions. This principle, which no one denies, and which they did not wish to affect, has at different times ^(m) been expressed in two different ways. By the common law lawyers of early times it was summed up in the principle that any man born within the King's allegiance ⁽ⁿ⁾ is, and must always remain, a natural-born English, or British subject, and the effect of the principle is represented by the acknowledged assumption that everyone, subject to very narrow exceptions, who is born within the King's dominions is thereby born within the King's allegiance, and that no one is born within the King's allegiance who is not born within the King's dominions. By the lawyers of later times it was summed up in the principle that every one born within the King's dominions is a natural-born British subject. Here, too, the tacit assumption is that every one born within the King's dominions, or, as we say now, within the British dominions, was born within the King's allegiance, and that, speaking generally, no one was born within the King's allegiance who was not born within the King's dominions. The two doctrines, fairly looked at, meant one and the same thing. The one was perfectly intelligible to common law lawyers imbued with feudal ideas; the other in later times was, and is, perfectly intelligible to any Englishman sufficiently educated to understand what is meant by the King's dominions, and to realise that Anglo-India is part of the King's dominions, and its inhabitants are as much natural-born British subjects as are the citizens of London, whilst Pondicherry, being part of the French dominions, is not part of the King's dominions, and persons born there are not, in virtue of their place of birth, natural-born British subjects. All this is plain enough to any one who has education enough to think the matter out, and it would have seemed that the natural course for the statesmen who framed the Act of 1914 would have been to use either the older or, better, the modern way of expressing a plain matter, and to lay down that any person must be deemed to be a British subject who is born within the King's dominions. They took, however, a different course. They in effect laid down that among persons who should be deemed to be natural-born British subjects should be "any person born within His Majesty's dominions and allegiance." This curious combination is open to several objections. It is not in itself comprehensible to any one but an English lawyer. It may puzzle even an English lawyer, for it suggests the inquiry whether a person born

^(m) See Note 7, p. 799, *ante*.

⁽ⁿ⁾ Or ligeance. The two words mean the same thing.

in the King's allegiance can fail to be a British subject, and generally makes obscure the perfectly plain rule that any ordinary person born within the King's dominions is, whatever his race or family, a natural-born British subject (o). It is quite possible that this combination of two different formulas as to the acquisition of British nationality at birth is on political grounds defensible, but it is regrettable that a rule of law hitherto perfectly understood should be so expressed as not to be comprehensible to ordinary persons. It were easy to find other cases in which the authors of the Act of 1914 have, unintentionally no doubt, rendered the law as to British nationality less comprehensible to ordinary persons than it was before the Act was passed.

Second. The Obscurity of the Objects aimed at by the Act of 1914.

The Act of 1914 cannot be fully understood except by reference to the twofold object with which it was passed. The Act was based on the acceptance of the doctrine, which experience has proved beneficial to the British Empire, that birth within the British dominions carries with it British nationality, and it derogates from this principle only in minor details. It accepted, further, the principle that in certain cases effect should be given to the doctrine, which since the beginning of last century has come to be preponderant on the continent, that nationality should depend not on place of birth but on race. But it interpreted that doctrine in rather a complex way. The law, as it stood when the Act was passed, recognized that British nationality could be acquired by inheritance from a paternal grandfather born within the British dominions. This enactment was thought to be open to objection, since under it a person whose father had been born, *e.g.*, in France, and had lived all his life there, and who himself was born and was living in France, was automatically a British subject, if his grandfather had been born within the British dominions. On the other hand, the rule of descent, if in some cases too wide, was in others too narrow; there existed communities, *e.g.*, in Egypt or Turkey or Southern Rhodesia (*p*), which were British in race, but the members of which by reason of birth outside the British dominions ceased to enjoy the rank of British subjects in the third

(o) In the 1st and 2nd editions of this book the matter is made quite plain, and it is stated that, subject to a few definite exceptions, any person born within the King's dominions is at the moment of his birth a natural-born British subject.

(p) Although a great distinction for other purposes existed between the exercise of extra-territorial jurisdiction, *e.g.*, in Egypt and in a Protectorate of the type of Southern Rhodesia or Nigeria, the difference was immaterial as regards questions of nationality. As regards Southern Rhodesia, difficulties will disappear on its formal annexation to the British dominions which will accompany the grant of responsible government.

generation. The Act, therefore, aimed at restricting the effect of descent in the case of persons born in foreign countries, while extending it in the case of persons born in places in which there existed British communities enjoying extra-territorial privileges. Persons, it was argued, whose real connections were purely foreign should not be made British subjects, while those who lived in foreign communities, but under British laws, should be treated as far as possible as if they were resident in some part of the British dominions.

Third. The Indirect Method of effecting these Objects.

For political reasons these objects are attained in the Act by indirect, and somewhat confusing, means. The two objects are dealt with in the following provisions of sect. 1 of the Act:—

The following persons shall be deemed to be natural-born British subjects, namely:—

- (b) any person born out of His Majesty's dominions, whose father was a British subject at the time of that person's birth and . . . was born within His Majesty's allegiance . . .

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects.

In interpreting these provisions it is essential to bear in mind that, save where expressly varied by statute, the common law doctrine remains, under which any person born outside the British dominions is an alien. It follows from this principle that British nationality can under the Act never be acquired by descent from a grandparent, for the condition refers only to the status of the father. The question then arises what conditions affecting the father are laid down in the words "born within His Majesty's allegiance."

In the first place, the terms clearly cover the case of any father born within the British dominions with the unimportant exceptions detailed in Rule 22. This is by far the most important effect of the provision, and it is unfortunate that it should be so indirectly expressed.

In the second place, the term is extended by the proviso to cover the case of any father born in a place where the King exercises extra-territorial jurisdiction. This is accomplished by the definition of "born within His Majesty's allegiance," but the wording of the proviso at first sight is confusing, and it has sometimes been interpreted as a substantive enactment conferring British nationality on

the child of a British subject by reason of birth in a place where the Crown exercises extra-territorial jurisdiction. Such an interpretation is utterly impossible, for the proviso merely defines what is birth within the allegiance, and sect. 1 (1) (a) of the Act makes it absolutely clear that birth within the allegiance by itself confers no claim to British nationality. The whole difficulty arises from the complexity inseparable from the definition of birth within the allegiance, but not within the British dominions. Two conditions must co-operate: (1) the child must be born in a place where the Crown exercises extra-territorial jurisdiction; and (2) the child must be the child of a British subject: an Italian child born, *e.g.*, in Egypt could not be said to be born within the allegiance. Hence the form of the definition in the proviso, which is an explanation of the terms "born within His Majesty's allegiance" in sect. 1 (1) (b), and applies, therefore, to the father of a child born out of His Majesty's dominions, and not to the child itself.

In concrete form the result of these provisions is as follows in the case of all children born outside the British dominions after the Act came into operation on January 1st, 1915:—

(1) *A*, the father, is a British subject, born in France or in some other foreign country in which the Crown has no extra-territorial jurisdiction; *S*, the son, born outside the British dominions, is not a British subject.

(2) *A*, the father, is a British subject, born in England or in some other part of the British dominions; *S*, the son, born outside the British dominions, is a British subject.

(3) *A*, the father, is a British subject, born in Egypt or in some other country in which the Crown has extra-territorial jurisdiction; *S*, the son, born outside the British dominions, is a British subject.

These principles apply whether *S* himself is born within the allegiance, in the sense of birth in a place where the King has extra-territorial jurisdiction, or in a foreign country in which the King has no such jurisdiction. His place of birth affects vitally the nationality of his children, but in no way his own nationality. The operation of the new rule provides an effective manner in which British nationality can be kept up from generation to generation, if a family remains in a place where extra-territorial jurisdiction is exercised. But it establishes also the strict rule that, if a man is born out of the British dominions, in a country where the King has no extra-territorial jurisdiction, he cannot transmit British nationality to any child.

This result, which was deliberately aimed at by the Act of 1914, has been regarded in a different light since the events of the war

showed the strength of British feeling in British communities in foreign states, and the change of sentiment has been strengthened by the certainty that extra-territorial jurisdiction will gradually disappear with the advance of civilization of backward States. It was accordingly agreed at the Imperial Conference of 1921 (*q*) that the various governments of the Empire should take into favourable consideration legislation under which the children of British subjects resident in foreign countries should be enabled to retain British nationality through the registration of their names within a year after birth with a British Consular officer, and the repetition of registration within a year after the attainment of majority (*r*). This scheme if accepted will mark a great advance towards the adoption of the continental doctrine that nationality should be connected with descent, while the older doctrine that nationality depends on birth within the British dominions will still be adhered to.

Fourth. The Relation between the Common Law and the Statutory Changes in the Doctrine of Nationality.

The Act of 1914, especially those portions dealt with in Rules 22, 24 and 25, can be understood only if it is clearly realized that the existing law as to British nationality remains the Common Law, except where that law is expressly varied by statute, and that accordingly the onus still rests on any person who claims to be a British subject, although born outside of the British dominions, to show that his case falls under some section of the Act. This fact explains the apparently unjust treatment of a posthumous child born in a foreign country; the Act confers British nationality only on children whose fathers fulfil one or other of the conditions set out in Rule 24 at the time of their birth, and a father who is dead does not fulfil any condition at that time.

NOTE 9.

JURISDICTION IN RESPECT OF ALIEN ENEMIES.

The cases regarding the position of alien enemies in English Courts, decided since the outbreak of war in 1914, have not varied in essentials the doctrine established by earlier decisions, but have adapted them to meet the much more complicated commercial relations existing under modern conditions.

(*q*) See Parliamentary Paper, Cmd. 1474, pp. 9, 65, 66. In cases in which the child has by birth acquired a foreign nationality, it is suggested that a declaration of alienage, if allowable, should be required if British nationality is to be retained.

(*r*) *I.e.*, by English law.

Alien Enemy as Plaintiff. The fundamental principle on this head is laid down in the following words of Sir W. Scott: "No man can sue [in British Courts] who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hac vice*, but otherwise he is totally *ex lex*" (s). This enumeration of excepted cases is not exhaustive; it rests on the doctrine that no alien enemy may sue unless he is in the King's peace, and suits were therefore allowed in respect of any trade for which licences had been issued by the Crown (t), and in 1797 it was even admitted that a prisoner of war was in a sense in the King's peace, and could bring an action, e.g., on a contractual obligation entered into by him after his captivity while on parole (u).

In accordance with these principles it has been held that an alien who was resident in England at the time of the outbreak of war, and who thereafter registered as required by the terms of the Aliens Restriction Act, 1914, and the Order in Council issued under that Act, might sue in the English Courts (x). Nor does it make any difference as regards this right that the alien has been interned as a matter of precaution, but in none of the decided cases does it appear that the alien had been interned as a result of proved hostility to the government (y). The right to sue includes the right to be granted letters of administration (z), and to petition for divorce (a), but, although on such a petition a divorce had been granted with the custody of the children of the marriage, the Court did not authorize the removal of the children to Germany during the continuance of the war (b). Further, if an alien enemy when lawfully resident in England, being exempt from internment, gives a power of attorney

(s) *The Hoop* (1799), 1 C. Rob. 195, 201. Compare *Wells v. Williams* (1697), 1 Ld. Raym. 282.

(t) See *Usparicha v. Noble* (1811), 13 East, 332; *Kensington v. Inglis* (1807), 8 East, 273; *Fleendt v. Scott* (1814), 5 Taunt. 674; *The Maria Theresa* (1813), 1 Dods. 303.

(u) *Sparenburgh v. Bannatyne* (1797), 1 Bos. & P. 163. Compare *Maria v. Hall* (1800), cited in 1 Taunt. 33.

(x) *Princess Thurn and Taxis v. Moffitt*, [1915] 1 Ch. 58. Compare *Volkl v. Rotunda Hospital*, [1914] 2 Ir. R. 549; *Schulze v. Bank of Scotland* (1914), 2 Sc. L. T. 455.

(y) *Schaffenius v. Goldberg*, [1916] 1 K. B. (C. A.) 284; *Norðman v. Rayner* (1916), 33 T. L. R. 87. An interned alien enemy like a prisoner of war (*The Three Spanish Sailors* (1799), 2 W. Bl. 1324) is not entitled to the benefits of a *habeas corpus*. See *Ex parte Weber*, [1916] 1 K. B. (C. A.) 280; [1916] 1 A. C. 421; *Ex parte Liebmann*, [1916] 1 K. B. 268; *Ex parte Freyberger*, [1917] 2 K. B. (C. A.) 129.

(z) *In re Schulze*, [1917] S. C. 400; *Schaffenius v. Goldberg*, [1916] 1 K. B. 284, 291.

(a) *Krauss v. Krauss* (1919), 35 T. L. R. 637.

(b) *Uhlig v. Uhlig* (1916), 33 T. L. R. 63.

irrevocable for twelve months to a solicitor to sell leasehold premises, the power remains valid although the alien enemy is repatriated, and thus ceases to be in the King's peace (*c*).

Moreover, an alien enemy, though not registered nor interned, can be joined as a plaintiff in an action brought by the English members of a partnership in the firm-name in respect of a debt contracted before the war (*d*), and he may appear in the Prize Court to claim any protection, privilege, or relief under the Hague Convention of 1907 to which he may be entitled (*e*).

In cases not falling within these principles an alien enemy has no right of action; even if he has commenced an action before the war, he cannot continue it when by the outbreak of war he becomes an alien enemy (*f*); nor can he present a bankruptcy petition against a debtor or even prove in a bankruptcy (*g*).

Alien Enemy as Defendant. As defendant an alien enemy is liable to suit (*h*), whether in England or not, to the same extent as if he were an ordinary defendant, and is entitled to all such privileges enjoyed by ordinary defendants which are necessary for effective defence, and which would not necessitate his acting in effect as a plaintiff (*i*). Thus an alien enemy may not counterclaim, but may plead his claim *pro tanto* as a set-off (*k*), and he cannot take third party proceedings (*l*). Nor could he claim the benefit of the Courts (Emergency Powers) Act, 1914. Further, the Legal Proceedings against Enemies Act, 1915, in cases where a British subject sought a declaration as to the effect of the war on a pre-war contract, evidenced in writing, authorized the Court to relax the rules regarding service of writs of summons and of evidence in favour of a plaintiff who would otherwise be inconvenienced or prejudiced by the absence of the alien enemy from the jurisdiction.

(*c*) *Tingley v. Müller*, [1917] 2 Ch. (C. A.) 144. Contrast the New South Wales case, *In re White* (1915), 15 S. R. (N. S. W.) 217.

(*d*) *Rodriguez v. Speyer Bros.*, [1919] A. C. 59. As to the dissolution of a partnership with alien enemies on war, see *Hugh Stevenson & Sons v. Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A. C. 239.

(*e*) *The Möwe*, [1915] P. 1, 15.

(*f*) *Hellfeld v. Rechnitzer* (1914), *The Times*, December 11th, 1914. Contrast *Shepeler v. Durant* (1854), 14 C. B. 582.

(*g*) *In re Wilson* (1915), 113 L. T. 1116; 84 L. J. K. B. 1893. Contrast *Ex parte Boussmaker* (1806), 13 Ves. 11.

Statutes of limitation (*semble*) run against an alien enemy, see *De Wahl v. Braune* (1856), 25 L. J. Ex. 343, a fact which adds importance to the decision arrived at, though not unanimously, by the House of Lords in *Rodriguez v. Speyer Bros.*, [1919] A. C. 59.

(*h*) *Robinson & Co. v. Continental Insurance Co. of Mannheim*, [1915] 1 K. B. 155.

(*i*) *Porter v. Freudenberg*, [1915] 1 K. B. (C. A.) 857, 883.

(*k*) *In re Stahlwerk, &c.*, [1917] 2 Ch. 272.

(*l*) *Halsey and Another v. Löwenfeld (Leigh and Curzon Third Parties)*, [1916] 2 K. B. (C. A.) 707.

Definition of Alien Enemy. As an alien enemy permitted to reside in England is not debarred from legal proceedings, so an alien enemy resident and carrying on business in an allied or neutral country is not debarred from suing (*m*). On the other hand, the Court of Appeal has laid it down that "for the purpose of determining civil rights a British subject or the subject of a neutral state who is voluntarily resident or who is carrying on business in hostile territory is to be regarded and treated as an alien enemy" (*n*), and a man may be held to be voluntarily resident, though he is subject to a measure of detention not amounting to actual captivity (*o*).

As regards corporations, it is now laid down by a majority of the judges in the House of Lords (*p*), that a company registered in England may nevertheless assume enemy character, and therefore be incapable of suing "if its agents or the persons in *de facto* control of its affairs are resident in an enemy country or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies," although "the character of individual shareholders cannot of itself affect the character of the company." The application of this principle, which, though not, technically speaking, binding on the Courts since the case in which it was laid down was decided on another ground, appears to be worthy of acceptance, is not without difficulty; it has been held that a company registered in England whose property was situate in a German colony, in which its business was wholly carried on, was nevertheless entitled to prove in the bankruptcy of a German subject interned in England, because the directors and the majority of shareholders, both in number and value, were resident in England, whence the business was controlled (*q*).

For the purpose of the war by the Trading with the Enemy (Extension of Powers) Act, 1915, power was given to the Crown to publish statutory lists of persons, or bodies of persons, in allied or neutral countries, who were by reason of enemy nationality or association, to be deemed to be enemies for the purpose of the Trading with the Enemy Acts. While such persons could not, it is clear, sue on any transactions into which British subjects were forbidden by the Trading with the Enemy legislation to enter, it does not seem

(*m*) *In re Mary, Duchess of Sutherland* (1915), 31 T. L. R. 394. Compare *Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484; *In re Grimthorpe's Settlement*, [1918] W. N. 16; *In re Schulze*, [1917] S. C. 400.

(*n*) *Porter v. Freudenberg*, [1915] 1 K. B. (C. A.) 857, 869.

(*o*) *Scotland v. South African Territories, Ltd.* (1917), 33 T. L. R. 255.

(*p*) *Daimler Co. v. Continental Tyre and Rubber Co.*, [1916] 2 A. C. 307, 345, *per* Lord Parker, a view concurred in by Lords Mersey, Kinnear and Sumner.

(*q*) *In re Hilckes, Ex parte Muhesa Rubber Plantations, Ltd.*, [1917] 1 K. B. (C. A.) 48.

that persons included in the statutory lists lost generally the capacity of suing in the Courts (*r*).

NOTE 10.

'SERVICE OF WRIT OUT OF ENGLAND.

ORDER XI., RULES 1, 2, AND 2A.

1. Service out of the jurisdiction [out of England] of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a judge whenever—

- (a) The whole subject-matter of the action is land situate within the jurisdiction [in England], (with or without rents or profits); or the perpetuation of testimony relating to land within the jurisdiction [in England]; or
- (b) Any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction [in England] is sought to be construed, rectified, set aside, or enforced in the action; or
- (c) Any relief is sought against any person domiciled or ordinarily resident within the jurisdiction [in England]; or
- (d) The action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction [in England], or for the execution (as to property situate within the jurisdiction [in England]) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England; or
- (e) The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract,
 - (i) made within the jurisdiction [in England], or
 - (ii) made by or through an agent trading or residing within the jurisdiction [in England] on behalf of a principal trading or residing out of the jurisdiction [out of England], or
 - (iii) by its terms or by implication to be governed by English law,or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction [in England] of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction

(*r*) See also the Trading with the Enemy (Enemy Subjects interned in Neutral Countries) Proclamation, November 27th, 1917.

- [out of England] which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction [in England]; or
- (ee) The action is founded on a tort committed within the jurisdiction [in England]; or
 - (f) Any injunction is sought as to anything to be done within the jurisdiction [in England], or any nuisance within the jurisdiction [in England] is sought to be prevented or removed, whether damages are or are not sought in respect thereof; or
 - (g) Any person out of the jurisdiction [out of England] is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction [in England]; or
 - (h) The action is by a mortgagee or mortgagor in relation to a mortgage of personal property situate within the jurisdiction [in England] and seeks relief of the nature or kind following, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, re-conveyance, delivery of possession by the mortgagee; but does not seek (unless and except so far as permissible under sub-head (e) of this Rule) any personal judgment or order for payment of any moneys due under the mortgage.

In this sub-head the expression "personal property situate within the jurisdiction [in England]" means personal property which, on the death of an owner thereof intestate, would form subject-matter for the grant of letters of administration to his estate out of the Principal Probate Registry; the expression "mortgage" means a mortgage charge or lien of any description; the expression "mortgagee" means a party for the time being entitled to or interested in a mortgage; and the expression "mortgagor" means a party for the time being entitled to or interested in property subject to a mortgage.

2. Where leave is asked from the Court or a Judge to serve a writ, under the last preceding Rule, in Scotland or in Ireland, if it shall appear to the Court or Judge that there may be a concurrent remedy in Scotland or Ireland (as the case may be), the Court or Judge shall have regard to the comparative cost and convenience of proceeding in England, or in the place of residence of the defendant or person sought to be served, and particularly in cases of small demands to the powers and jurisdiction, under the statutes establishing or regulating them, of the Sheriff's Courts, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively.

2a. Notwithstanding anything contained in Rule 1 of this Order, the parties to any contract may agree (a) that the High Court of Justice shall have jurisdiction to entertain any action in respect of such contract, and, moreover or in the alternative, (b) that service of any Writ of Summons in any such action may be effected at any place within or out of the jurisdiction [England] on any party or on any person on behalf of any party or in any manner specified or indicated in such contract. Service of any Writ of Summons at the place (if any) or on the party or on the person (if any) or in the manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident, and if no place or mode or person be so specified or indicated, service out of the jurisdiction [England] of such Writ may be ordered.

ORDER XLVIII. (19 JUNE, 1891), RULE 1.

Actions by and against Firms and Persons carrying on Business in Names other than their own.

Any two or more persons claiming or being liable as co-partners, and carrying on business within the jurisdiction, may sue or be sued in the name of the respective firms, if any, of which such persons were co-partners at the time of the accruing of the cause of action; and any party to an action may in such case apply by summons to a judge for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, co-partners in any such firm, to be furnished in such manner, and verified on oath or otherwise, as the judge may direct.

NOTE 11.

LIST OF ADMIRALTY CLAIMS (*m*).

(*i*) Any claim as to (1) the possession, (2) the ownership, (3) the earnings or employment, of any ship registered at any port in England (*n*).

This head includes three different kinds of claims, viz., a claim to the possession of a ship (e.g., where a ship is wrongfully detained

(*m*) *I.e.*, claims in respect of which an Admiralty action is maintainable. See Williams & Bruce, *Adm. Prac.*, 3rd ed., or 4th ed., by E. S. Roscoe, chaps. i. to ix. inclusive. It may be well to observe that in this Note "British" means (1) as applied to a ship, a ship owned by British subjects within the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 1; and (2) as applied to waters, territorial waters of the British dominions (see Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73)), and "foreign" means "not British."

(*n*) See Williams & Bruce, *Pt. I.*, chap. i., pp. 27—36; Roscoe, pp. 45—61; Admiralty Court Act, 1861 (24 Vict. c. 10), s. 8; 3 & 4 Vict. c. 65, s. 4. "England" in these claims includes Wales. See p. 72, *ante*.

by the master and an action is brought to dispossess him (o)); a claim involving a dispute as to *ownership* (p) and claims by an owner or owners against the co-owners of a ship, under which class comes the proceeding called "an action of restraint," whereby the minority in interest of the owners of a British ship obtain security from the majority when about to send the ship on a voyage against the will of the minority (q).

(ii) *Any claim to the ownership, possession, or employment of any foreign ship which the representative of the State (r) to which the ship belongs consents, or which the parties to the action consent, to have tried (s).*

"It is with the greatest reluctance that the Court adjudicates in suits of possession where foreigners alone are concerned; when it does proceed in such cases, it is only in order to prevent further inconvenience and loss by resort to the decisions of other Courts in other countries. Where the consent of the representative of the foreign State to which the vessel belongs is withheld, such a suit is seldom or never entertained unless it has been referred to the Court by the agreement of the parties. In a suit between foreigners, where the main question in the cause depends upon the municipal law of foreign States, and not upon any principle of the maritime law as administered in this country, the Court will decline to decree possession, for it will not be instrumental in depriving foreigners of rights to which they may be entitled by the law of their own country. But the Court will entertain a suit instituted by a British subject to recover possession of a ship which has come to this country in the possession of foreigners" (t).

It is doubtful whether the Court has jurisdiction to entertain an action of restraint in the case of a foreign ship (u).

(o) *The New Draper* (1802), 4 Rob. 287; *The See Reuter* (1811), 1 Dod. 22; *The Kent* (1862), Lush. 495.

(p) *The Empress* (1856), Swab. 160; *The Glasgow* (1856), Swab. 145.

(q) *The Talca* (1880), 5 P. D. 169.

(r) *I.e.*, in practice the consul.

(s) W. & B., p. 29. They do not make a separate head of jurisdiction in respect to foreign owners, but group together all claims having reference to possession, restraint, and ownership. Roscoe (pp. 45, 46) similarly treats claims by British and foreign owners together, classifying them according to their objects as (1) to place claimants in possession of a ship, or (2) of the earnings of a ship to which they may be entitled, or (3) while protecting the interests of one or more co-owners, to enable a ship to be employed, or (4) to examine accounts between co-owners, and to apportion the earnings after such examination. Compare *Bow, McLachlan & Co. v. Camosun (Ship)*, [1909] A. C. 597, 606.

(t) W. & B., pp. 29, 30; Roscoe, pp. 50—52; and see *The Annette*, [1919] P. 105, for a more extended view as to the propriety of dealing with claims as to foreign vessels.

(u) *The Graff Arthur Bernstorff* (1854), 2 Spinks, Ecc. & Ad. 30; Roscoe, p. 55, note (o).

(iii) *Any claim in respect of any mortgage (x) where either (a) the ship is, or the proceeds thereof are, under arrest (y), or (b) the mortgage has been duly registered under the Merchant Shipping Act, 1894 (z).*

The Court of Admiralty had no original jurisdiction *in rem* over mortgages. It acquired, however, by statute, jurisdiction (which has passed to the High Court) in two cases: (1) Where the mortgage is unregistered, but the ship mortgaged is under the arrest of the Court, or (2) the proceeds thereof have been brought into the registry (a).

The arrest, it should be noted, must be not only an actual arrest, but a rightful arrest, that is, it must be an arrest in a suit which the Court has jurisdiction to entertain (b).

(iv) *Any claim to enforce a bottomry (c) bond.*

"Bottomry is a contract by which, in consideration of money advanced for the necessities of a ship to enable it to proceed on a voyage, the keel or bottom of the ship, *pars pro toto*, is made liable for the repayment of the money in the event of the safe arrival of the ship at its destination. Not only the ship, but the freight and cargo, may be the joint or single subject of hypothecation. When the cargo alone is hypothecated, the term *respondentia* is applied to the contract. Respondentia bonds rest on the same general principles as bottomry bonds on the ship" (d), and for the present purpose may be included under bottomry. The Court, as representing the Court of Admiralty, has original jurisdiction to entertain an action *in rem* for any claim on a bottomry bond or on a respondentia bond.

(v) *Any claim arising out of an agreement relating to the use or hire of a ship.*

This class of claims is added by the Administration of Justice Act, 1920 (e). No distinction is made between British and foreign ships, but (1) the claim is not maintainable if at the time of the institution of the proceedings any owner or part owner of the ship is domiciled in England or Wales, and (2) the plaintiff will not be entitled to any

(x) W. & B., Pt. I., chap. ii., pp. 37—46; Roscoe, pp. 62—68.

(y) 3 & 4 Vict. c. 65, s. 3; *The Evangelistria* (1876), 2 P. D. 241, n.

(z) Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 11; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 31—38, taken with Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. (1).

(a) 3 & 4 Vict. c. 65, s. 3.

(b) *The Evangelistria* (1876), 2 P. D. 241, n.; *Taylor v. Caryl* (1857), 20 Howard, 583, 599 (U. S.).

(c) W. & B., Pt. I., chap. iii., pp. 47—72; Roscoe, pp. 69—79.

(d) W. & B., p. 47; cf. Roscoe, p. 69.

(e) 10 & 11 Geo. 5, c. 81, s. 5, and especially sub-s. (1) (a). Compare *The Montrosa*, [1917] P. 1, *per* Evans, Pres.

costs unless he recovers at least 20*l.*, and, unless he recovers at least 300*l.*, will only be entitled to costs on the county court scale, except where the Court or a judge certifies that there was sufficient reason for bringing the proceedings in the High Court. The jurisdiction may be exercised either in proceedings *in rem* or in proceedings *in personam*.

(vi) *Any claim relating to the carriage of goods in any ship, and any claim in tort in respect of goods carried in any ship.*

These classes of claims are added by the same Act (f). They extend the provision made in the Admiralty Court Act, 1861(g), under which, as interpreted by the Court, jurisdiction was confined to any claim by the owner, consignee, or assignee of a bill of lading of any goods carried, or to be carried, by any British or foreign ship into any port in England for (1) damage done to goods by the negligence or misconduct of the owner, master, or crew, or (2) any breach of duty or any breach of contract in relation to the goods, and in connection with damage to them, on the part of the owner, master, or crew. As under the Act of 1861, claims are not maintainable if any owner or part owner of the ship is domiciled in England or Wales, and the Act of 1920 makes the same provision as in the preceding class of claims regarding the recovery of costs if the case is brought in the High Court.

The decisions (h) under the Act of 1861 are still, of course, applicable save where they conflict with the express terms of the new enactment. Hence it appears that (1) claims relating to the carriage of goods will include claims in respect of short delivery of cargo (i), and claims in respect of goods which are merely brought incidentally into a British port (k); (2) any claim in tort must relate to goods carried on a ship and does not include negligence by the master of a ship before the goods are actually put on the vessel (l).

The Act of 1920 makes it clear that the rule that no claim can be brought if an owner or part owner of the ship is domiciled in England or Wales (m) refers to domicile at the time of the institution of the

(f) 10 & 11 Geo. 5, c. 81, s. 5, sub-s. (1) (b) and (c).

(g) 24 Vict. c. 10, s. 6.

(h) W. & B., Pt. I., chap. v. See also *Ship Marlborough Hill v. Cowan & Sons*, [1921] 1 A. C. 444.

(i) *The Danzig* (1863), Br. & L. 102.

(k) *The Pieve Superiore* (1874), L. R. 5 P. C. 482; *The Bahia* (1863), Br. & L. 61; *The Cap Blanco*, [1913] P. 130.

(l) *The Santa Anna* (1863), 32 L. J. P. & M. 198.

(m) The term "England or Wales" which is used in reference to domicile in the Acts regulating Admiralty jurisdiction is strictly speaking inaccurate; for the purpose of domicile, as explained above (Rules 1—19, pp. 83—163, *ante*), England includes Wales, the whole territory being under a single system of law.

proceedings. The jurisdiction of the Court may be exercised either in proceedings *in rem* or in proceedings *in personam*.

(vii) *Any claim for damage done or received by any British or foreign (n) ship, whether on the high seas or not (o).*

"The Court of Admiralty always exercised undisputed jurisdiction "over torts committed by its own subjects on the high seas, but the "ancient statutes expressly prohibited it entertaining any cause of "action arising within the body of a country. So far, however, as "related to the jurisdiction of the Court in cases of damage, this "prohibition was almost entirely done away with prior to the transfer "of the jurisdiction of the Admiralty Court to the High Court of "Justice" (p). Since the Admiralty Court Act, 1861, the Court of Admiralty has entertained suits for collision between British ships in foreign inland waters; and the Court of Admiralty, and the High Court as representing it, has also entertained suits for collisions between foreign ships in foreign waters, and between an English and a foreign ship in foreign waters (q).

The term "damage" in this claim includes personal injury (r). But the Court of Admiralty never possessed, and the High Court therefore had originally no jurisdiction to entertain an action *in rem* for loss of life, under Lord Campbell's Act (s) or otherwise. But under the Maritime Conventions Act, 1911, s. 5, jurisdiction in such cases has been conferred on the Court (t).

(viii) *Any claim for salvage (u).*

"Salvage is the reward payable for services rendered in saving "any wreck, or in rescuing a ship or boat, or her cargo, or apparel,

(n) See *The Mecca*, [1895] P. (C. A.) 25, 108, judgment of Lindley, L. J.

(o) W. & B., Pt. I., chap. iv., pp. 73—121; Roscoe, pp. 80—135; 3 & 4 Vict. c. 65, s. 6; Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 7; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 688, taken with Interpretation Act, 1889, s. 38, sub-s. (1); 1 & 2 Geo. 5, c. 57; *The Clara Killam* (1870), L. R. 3 A. & E. 161; *The Malvini* (1863), Br. & L. 57; *The Griefswald* (1859), Sw. 430; *The Sylph* (1867), L. R. 2 A. & E. 24; *The Diana* (1862), Lush. 539; *The Courier* (1862), Lush. 541; *The Vera Cruz* (1884), 10 App. Cas. 59; *The Robert Pow* (1863), Br. & L. 99; *The Zeta*, [1893] A. C. 468, 477—488. See *The Theta*, [1894] P. 280; *The Circe*, [1906] P. 1; *The Rigel*, [1912] P. 99; *The Amerika*, [1914] P. (C. A.) 167; [1917] A. C. 38, as to meaning of damage done "by" a ship.

(p) W. & B., p. 73.

(q) *Ibid.*, p. 77; *The Courier* (1862), Lush. 541; *The Diana* (1862), Lush. 539; *The Halley* (1868), L. R. 2 P. C. 193.

(r) *The Sylph* (1867), L. R. 2 A. & E. 24.

(s) *The Vera Cruz* (1884), 10 App. Cas. 59.

(t) *The Espanoleto*, [1920] P. 223.

(u) W. & B., Pt. I., chap. vi., pp. 127—186, and especially p. 150; Roscoe, pp. 144—219. See also as to salvage for saving life, Admiralty Court Act, 1861 (24 & 25 Vict. c. 10), s. 9, and Merchant Shipping Act, 1894, s. 545, taken with Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. (1); Merchant Shipping (Salvage) Act, 1916 (6 & 7 Geo. 5, c. 41); *The Willem III.* (1871), L. R. 3 A. & E. 487; *The Johannes* (1860), Lush. 182.

"or the lives of the persons belonging to her from loss or "danger" (x).

For all details as to the nature of salvage, the reader is referred to books on Admiralty law, and especially to Williams & Bruce's *Admiralty Practice* (y).

For our present purpose the following points should be noted:—

First. The Court of Admiralty had originally no jurisdiction in salvage cases unless the services were performed on the high seas; but the jurisdiction of the Court has been gradually extended by various statutes, and now, by s. 565 of the Merchant Shipping Act, 1894, it is provided that, subject to certain provisions in that Act (z), the High Court has "jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which "salvage is claimed were performed on the high seas or within the "body of any county, or partly on the high seas and partly within "the body of any county, and whether the wreck in respect of which "salvage is claimed is found on the sea or on the land, or partly on "the sea and partly on the land" (a).

Secondly. The jurisdiction to entertain claims for salvage of life extends to the salvage of life from any British ship wheresoever the service may be performed, and from any foreign ship where the service has been rendered either wholly or in part in British waters, and may, under an agreement with the government of any foreign country, be extended by Order in Council to cases in which the services are rendered by the saving of life from a ship of such foreign country, whether within British waters or not (b).

(ix) *Any claim for towage (c) against any British (d) or foreign ship (e).*

(x) "But salvage is not due for services rendered to property lost at sea, other "than a ship, her apparel, or her cargo, or property which had formed part "of these, or freight which was being earned by carriage of the cargo." W. & B., pp. 127, 128. See *The Gas Float Whitton* (No. 2), [1897] A. C. 337; Roscoe, pp. 152, 153.

(y) See W. & B., chap. vi., p. 127 and following; Roscoe, p. 144 and following.

(z) As to which see W. & B., pp. 143—189.

(a) Merchant Shipping Act, 1894, s. 565, re-enacting Merchant Shipping Act, 1854, s. 476, and Maritime Conventions Act, 1911, s. 9 (3). See further, as to salvage for saving life, Admiralty Court Act, 1861, s. 9; Merchant Shipping Act, 1894, s. 545; W. & B., p. 130; *The Willem III.* (1871), L. R. 3 A. & E. 487; *The Johannes* (1860), Lush. 182; *The Suevic*, [1908] P. 152.

It is expressly provided by the Maritime Conventions Act, 1911, s. 7, that the apportionment of salvage among the members of the crew of a foreign ship is to be carried out on the base of the law of the country to which the ship belongs.

(b) Merchant Shipping Act, 1894, s. 545; and W. & B., p. 144, note (g).

(c) 3 & 4 Vict. c. 65, s. 6; W. & B., Part I., chap. vii.; Roscoe, pp. 220—237.

(d) As to meaning of "British" and "foreign," see note (m), p. 815, *ante*.

(e) W. & B., p. 187. Compare *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

(x) *Any claim for necessities supplied to any foreign ship (f).*

This claim, which rests upon 3 & 4 Vict. c. 65, s. 6, applies only to *foreign ships*; but a claim against a ship which, at the time when the necessities were supplied, belonged to a foreigner, cannot be defeated by a transfer to a British owner before (g) or after (h) the commencement of the action. The words of the section give the Court jurisdiction to entertain claims for necessities supplied to a foreign ship in a British (i) or colonial port, or upon the high seas (k), but not for necessities supplied to a foreign ship in a foreign port which is not also a port on the high seas (l), and "it has been laid down in general terms that the Court will entertain claims for necessities only in cases where the owners would be liable at common law" (m). Under the Merchant Shipping (Stevedores and Trimmers) Act, 1911 (1 & 2 Geo. 5, c. 41), s. 3, claims for stowing, discharging, and trimming foreign ships may be enforced as claims for necessities.

(xi) *Any claim for necessities supplied to any ship (n) elsewhere than in the port to which she belongs (o).*

This claim is not maintainable if any owner, or part owner, of the ship is domiciled (p) in England (q).

This claim, the jurisdiction to entertain which depends upon the Admiralty Court Act, 1861, s. 5, applies whether the ship to which the necessities are supplied be British or foreign (r).

The jurisdiction to maintain the claim is subject to two restrictions:—

(1) The necessities must not be supplied in the port to which the ship belongs.

(2) No owner of the ship must be domiciled in England or Wales.

(f) 3 & 4 Vict. c. 65, s. 6; W. & B., chap. viii., pp. 190—199; Roscoe, pp. 238—241; *The Henrich Björn* (1886), 11 App. Cas. 270. See *The Mecca*, [1895] P. (C. A.) 95, overruling *The India* (1863), 32 L. J. P. & M. 185, 186, judgment of Dr. Lushington, and note that cases which do not come within claim x. may come within claim xi.

(g) *The Ella A. Clark* (1863), Br. & L. 32, 37.

(h) *The Princess Charlotte* (1864), 33 L. J. P. & M. 188.

(i) *The Henrich Björn* (1886), 11 App. Cas. 270.

(k) *The Wataga* (1856), Sw. 165.

(l) *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

(m) W. & B., p. 192; compare Roscoe, pp. 238, 239.

(n) *I.e.*, any ship, whether British or foreign. See *The Mecca*, [1895] P. (C. A.) 95, overruling *The India* (1863), 32 L. J. P. & M. 185.

(o) 24 & 25 Vict. c. 10, s. 5; W. & B., p. 197; Roscoe, pp. 238, 242; *The Pacific* (1864), Br. & L. 243; *Ex parte Michael* (1872), L. R. 7 Q. B. 658; *The Two Ellens* (1872), L. R. 4 P. C. 161; *The Henrich Björn* (1886), 11 App. Cas. 270; *The Ella A. Clark* (1863), Br. & L. 32; *The Tolla*, [1921] P. 22.

(p) As to nature of domicile, see Rules 1—11, pp. 83—137, *ante*.

(q) *The Bahia* (1863), Br. & L. 61.

(r) *The Mecca*, [1895] P. (C. A.) 95.

(xii) *Any claim of the master or seamen for wages earned on board any British or foreign (s) ship, and of the master for disbursements on account of such ship (t).*

No distinction is drawn between claims by those serving on board British ships, and claims, either by foreigners or by British subjects, against foreign vessels which happen to be in the ports of this kingdom. At the same time the exercise of this jurisdiction is, as regards a foreign ship, discretionary with the Court; and if the consent of the representative of the government to which the vessel belongs is withheld upon reasonable cause being shown (u), the Court may decline to exercise its authority (x).

(xiii) *Any claim for building, equipping, or repairing any British or foreign (y) ship, where, at the commencement of the action, the ship is, or the proceeds thereof are, under arrest (z).*

(xiv) *Any claim to enforce a judgment in rem obtained against a British or foreign ship in a foreign Court (a).*

A judgment *in rem* is obtained against a ship in a foreign Court of Admiralty whereby the plaintiff in the foreign action is entitled to recover 25,000*l.* The judgment not having been satisfied, the ship comes into an English port. A, the plaintiff in the foreign action, brings an action *in rem* against the ship in respect of the foreign judgment. The Court has jurisdiction to entertain the action (b).

This claim (it is submitted) may be put in a more general form, and it may be laid down that the Court has jurisdiction to entertain an action *in rem* for the enforcement of any maritime lien if the case is one in which, according to English law, a maritime lien exists.

(s) See *The Mecca*, [1895] P. (C. A.) 95.

(t) Admiralty Court Act, 1861, s. 10; W. & B., Pt. I., chap. ix., pp. 200—221; Roscoe, pp. 244—259.

(u) *The Leon XIII.* (1883), 8 P. D. (C. A.) 121.

(x) *The Nina* (1867), L. R. 2 P. C. 38. See *The Octavie* (1863), Brown & Lush. 215.

(y) *The Mecca*, [1895] P. (C. A.) 95, 108, judgment of Lindley, L. J.

(z) W. & B., pp. 198, 199; Roscoe, pp. 238, 242, 243; 24 Vict. c. 10, s. 4; *The Ameroid* (1877), 2 P. D. 189.

(a) *The City of Mecca* (1879), 5 P. D. 28; (1881), 6 P. D. (C. A.) 106; *The Bold Buccleugh* (1851), 7 Moore, P. C. 267; W. & B., p. 121.

(b) *The City of Mecca* (1881), 6 P. D. (C. A.) 106. The action failed in the particular case because the foreign judgment was not a judgment *in rem*, but the principle was apparently admitted. The jurisdiction does not depend upon statute.

NOTE 12.

THEORIES OF DIVORCE.

The doctrine maintained by the Courts of any country with regard to jurisdiction in matters of divorce and points connected therewith ultimately depends upon the view entertained by such Courts with regard to the nature of divorce. On this matter three different theories, resting at bottom on the different views which may be taken of marriage, have been maintained at different times and in different countries. These theories may for convenience be termed the "contractual theory," the "penal theory," and the "status theory" of divorce.

(A) **The Contractual Theory.**—Marriage may be regarded mainly as a contract between the parties thereto. On this view of marriage, divorce is naturally regarded as the rescission of the marriage contract, on the terms or conditions (if any) for its determination agreed upon between the parties at the time of the marriage; as, for example, that it might be put an end to on the ground of incompatibility of temper, or of the husband's desertion of the wife. Even on what may be termed the extreme contractual theory, marriage has never in modern times been put on exactly the same footing as other agreements. The conditions of the contract, as to its rescission and otherwise, have never, in Christian countries at least, been held to be subject to variation at the will of the parties, but have always been treated as determined by the law of the country under the law whereof the marriage is made. It has further been almost universally held that a marriage can be dissolved only by public authority. Still, on the contractual view, a divorce may fairly be described as the rescission of a contract, and the right to divorce may be regarded as the right of the party aggrieved to have the marriage contract rescinded on the conditions, if any, agreed upon between the parties with reference to its rescission.

Results of Theory.—From this theory two consequences naturally ensue. First, if the parties marry under a law which, like that of England before 1858, or of modern Italy, does not recognize divorce, neither of them can have under any circumstances the right to petition the tribunals of any country whatever for a divorce. For a person who has married, for instance, under the law of Italy, has entered into an agreement, one of the terms of which is that it shall never be rescinded. He cannot, therefore, have, in virtue of this contract, a ground for applying to the Courts of any country whatever for its

rescission (c). Secondly, jurisdiction in matters of divorce belongs, on this view, exclusively to the tribunals of the country under the law of which the marriage was celebrated. The latter conclusion is no doubt not an inevitable, but is certainly a natural, result of the general theory.

Defects of Theory.—The contractual theory, though often maintained, has never been found satisfactory (d). The parties to a marriage do not, in fact, contemplate its rescission, but intend to enter into an agreement for life. The intervention, again, of the state aims rather at the punishment of an offender or the relief of a person injured by the misconduct of another, than at the giving effect to a contract.

(B) **Penal Theory.**—Marriage may be regarded as a contract imposing on each of the parties duties in the fulfilment of which the state is so much concerned that the breach thereof exposes the offender to legal penalties. On this view of marriage a divorce is naturally regarded as the penalty inflicted by the state on offences against the marriage relation.

Results of Theory.—The “penal theory” is inconsistent with the view that the right to divorce depends on the terms imposed by the law under which the parties married. The liability to divorce depends, on the penal theory, like the liability to other criminal punishments, on the law of the place where the criminal is residing, or where the offence is committed. Hence, jurisdiction in matters of divorce is, on this view, given by the temporary residence of married persons within a given country, especially if the offence against the marriage relation, *e.g.*, adultery, is committed within the limits of such country. The penal theory of divorce has not, on the whole, been favoured by English tribunals (e), but has certainly influenced Scottish Courts, and affords the theoretical justification for the freedom with which they at one time in practice exercised jurisdiction in matters of divorce (f).

Defects of Theory.—This theory has at least two defects. Divorce, in the first place, is not of necessity a penal proceeding. It may, as

(c) *Tovey v. Lindsay* (1813), 1 Dow, 117, 131, 140.

(d) *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Mordaunt v. Mordaunt* (1870), L. R. 2 P. & D. 109, 126, judgment of Lord Penzance.

(e) *Mordaunt v. Moncrieffe* (1874), L. R. 2 Sc. Ap. 374. Thus a committee of a lunatic may bring a suit for the dissolution of the lunatic's marriage. *Baker v. Baker* (1880), 5 P. D. 142. “Proceedings of this kind [*i.e.*, for “divorce”] are not criminal, and if not criminal then they must be civil, for there cannot be *quasi-civil* or *quasi-criminal* cases.” *Branford v. Branford* (1878), 4 P. D. 72, 73, judgment of Hannen, President.

(f) See Note 16, *post*.

in countries where it is granted because of the lunacy of one of the parties to the marriage, not be the punishment for any offence, and is, in any case, far more naturally looked upon as a measure of relief to the husband or wife, or to both, than as a punishment to either. In the second place, if divorce be the punishment for a crime, there is a difficulty in seeing why it should have an extra-territorial effect.

(C) **Status Theory.**—Marriage may be regarded as a contract which creates or constitutes a special status, viz., the status or condition of husband and wife. On this view of marriage a divorce is the act by which a state through a public authority dissolves or puts an end to the marriage status.

Results of Theory.—First, the claim to divorce has, on this view, no connection with the terms of the marriage contract, for a divorce is not the rescission of an agreement, but the extinction of a status, the continuance of which is in the judgment of the state inexpedient, whether on grounds of justice or of policy. Hence, secondly, the fact that the parties were married under a law which did not recognize divorce affords no reason why the Courts of a state, the law of which does recognize divorce, should not dissolve their marriage. Thirdly, jurisdiction to dissolve a marriage naturally belongs on this view exclusively to the tribunals of the country where the parties are domiciled. For this is, according to the doctrine generally prevalent, the country to which the parties belong, and by the law of which their status is determined (*g*). Fourthly, a judgment pronounced by such tribunals has effect everywhere.

It should be noticed that the Courts of countries, whose law makes allegiance and not domicil determine a person's status, would naturally hold that the right to divorce depends on the law of the country of which the parties to a marriage are citizens, and that jurisdiction in matters of divorce belongs exclusively to the Courts of such country (*h*).

(*g*) See judgment of Brett, L. J., *Niboyet v. Niboyet* (1878), 4 P. D. (C. A.) 1, 9; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *Bater v. Bater*, [1906] P. (C. A.) 209, 238.

(*h*) Compare the International Convention of June 12, 1902, as to divorce.

NOTE 13.

JURISDICTION OF THE HIGH COURT IN THE CASE OF
A MARRIAGE CELEBRATED IN ENGLAND EITHER
(1) TO GRANT DIVORCE ON THE PETITION OF A WIFE
WHOSE HUSBAND IS NOT DOMICILED IN ENGLAND,
OR (2) TO PRONOUNCE SUCH A MARRIAGE INVALID
THOUGH NEITHER PARTY IS DOMICILED IN
ENGLAND.

This Note embraces four distinct though closely inter-connected topics; they all have reference to the jurisdiction of the Court with regard to a marriage duly celebrated in England, and which, if the law of no foreign country is to be taken into account, must be held valid according to the territorial law of England. For convenience, be it further noted, a marriage so celebrated in England is frequently hereinafter called an English marriage. The four different though inter-connected topics may be described as (A) the jurisdiction of the Court to pronounce a divorce on the petition of a wife whose husband is not domiciled in England (*i*); (B) the jurisdiction of the Court to pronounce an English marriage invalid though both or either of the parties may not be domiciled in England; (C) the impossibility of logically reconciling the judgments of English Courts on the subject of this Note; (D) the modes for obtaining such logical reconciliation (*k*).

(A) **As to the Jurisdiction of the Court in Divorce.**—The whole question to be considered is whether the Exception to Rule 63 is legally valid, or, in other words, whether it is certain to be accepted by the Court? This may seem a strange inquiry. The Exception certainly meets the injustice felt by the general public, and also by many judges, to be worked by a condition of the law which places a woman, and especially an Englishwoman who is a British subject and immediately before her marriage domiciled in England, in the position of being held in England the wife of, *e.g.*, a French husband, whilst in France she is treated as an unmarried woman. The two cases of *Stathatos v. Stathatos* (*l*) and *De Montaigu v. De Montaigu* (*m*) are, in one sense, of undoubted authority. They have not been overruled; they probably will be followed as precedents by a judge of the Divorce Court if a case exactly the same as either of them should be brought before the Court. Yet for all this the legal authority of these

(*i*) See Exception to Rule 63, p. 294, *ante*.

(*k*) See Rule 63, and especially Illustrations thereof, pp. 293, 295, *ante*.

(*l*) [1913] P. 46.

(*m*) [1913] P. 154.

two cases is certainly open to question. Two decisions by a Court of first instance hardly suffice to set aside two of the best established principles with regard to the conflict of laws to be found in the law of England, namely, that a wife's domicile is the same as that of her husband, and that the Courts of no country, whether English or foreign, have (subject to the most limited exceptions (*n*)) jurisdiction to divorce any persons who are not domiciled in such country. There are several further circumstances which detract from the weight of the two decisions which in reality support the Exception now under consideration. Many of the cases, in the first place, cited on this subject do not refer, in strictness, to divorce jurisdiction, but to the quite different topic of the Court's jurisdiction to declare a marriage invalid (*o*), and judicial expressions, however strong, used in such cases are merely *obiter dicta*, and cannot be cited as judgments. The two cases, in the second place, of *Stathatos v. Stathatos* and *De Montaigne v. De Montaigne* do not in reality support each other, for the latter case really goes a good deal further than *Stathatos v. Stathatos*. No doubt judges of eminence, and even the Court of Appeal, will be found to have frequently expressed a desire that the present state of the law should be changed (*p*), but this very desire is hardly consistent with the conviction on the part, *e.g.*, of the Court of Appeal that the law has been wrongly laid down, and may, therefore be changed by judicial decision. It is further in this connection worth noting that in a case referring not to divorce, but to a petition for judicial separation, it has been suggested that where a husband has deserted his wife, or has so conducted himself towards her that she is justified in living apart from him; and the parties have up to the time of such desertion or justification been domiciled in England; and the husband has after such time acquired a domicile in a foreign country, but the wife has continued resident in England; the Court has on the petition of the wife jurisdiction to grant a divorce. This statement, which is drawn almost *verbatim* from the language of Sir J. Gorell Barnes in *Armstrong v. Armstrong* (*q*), has

(*n*) See Rule 99, p. 420, and Exception thereto, p. 422, *ante*.

(*o*) Speaking generally every case bearing on the topic in hand earlier than *Stathatos v. Stathatos* refers in reality to jurisdiction to declare a marriage invalid.

(*p*) See *Ogden v. Ogden*, [1908] P. (C. A.) 46, 82, 83.

(*q*) [1898] P. 178. This principle seems to have been acted on in *Bertin v. Bertin* (1905), *The Times*, Nov. 7, 1905, but not in *Parker v. Parker* (1906), *The Times*, April 25, 1906. It is specifically provided for in the legislation of several British possessions, *e.g.*, New Zealand, see *Poingdestre v. Poingdestre*, 28 New Zealand L. R. 604. A temporary exception (*Gibson v. Gibson* (1920), 37 T. L. R. 124) to the law regarding domicile as the basis of divorce jurisdiction was created by the Matrimonial Causes (Dominions Troops) Act, 1919 (9 & 10 Geo. 5, c. 28), in the case of the marriage of soldiers domiciled in the Dominions to women domiciled in the United Kingdom, but this Act has now expired. Cf. Keith, Responsible Government, iii. 1238—1244.

received the approval of Westlake, and has been, in the second edition of this work, treated as an exception to Rule 49 (now 63), but such an exception, whether valid or not, hardly meets the evil which the present Exception to Rule 63 is intended to remove, and, further, the very language of the judgments delivered in *Stathatos v. Stathatos* and *De Montaigu v. De Montaigu* suggest that in each of these cases the very judge who delivered the judgment gravely doubted in his own mind whether he was not, with a view to the public benefit, making a claim to jurisdiction which he did not by law possess. Any student who may imagine that this statement is exaggerated should read the judgments in these two cases.

"If I am wrong" [says Sir Bargrave Deane, J.] "in what I am about to do in this case, I hope it will not be taken as a precedent, unless and until the Court of Appeal has an opportunity of approving it.

"I am going to pronounce a decree nisi. The dictum of Lord Gorell in *Ogden v. Ogden* (otherwise *Philip*) (*r*) appears to me unanswerable. I think that for an Englishwoman, as Miss Henry the present petitioner was, domiciled here and married here, to be told that she is a wife in England, but no wife in Greece, the country of her husband, would be a disgrace both to our law and to our practice. There must be a way out of it. The only way out of it is that which has been suggested. She became a Greek subject domiciled in Greece by her marriage with the respondent. The Greek Court has said No, we cannot recognize you; you must go back to your English domicile, and get what relief you can from the Courts of that domicile. She has come to this Court and asks for relief by virtue of her English domicile, which she says the Greek Court has thrown her back upon.

"I may be wrong: the Court of Appeal, through Lord Gorell, may have been wrong in what they suggested; but it seems to me such good common sense, and so just, that, whether right or wrong, I am going to act upon it" (*s*).

The language of Sir Samuel Evans is equally suggestive:—

"The situation [of the wife] is an intolerable one for the wife, and I think it better, where necessary, in a case like this to make an exception from the ordinary rule that domicile governs these cases, and to grant her a decree, as a practical way of giving her the redress to which she is entitled, and without which she will be suffering great hardship. I think it better to make this exception than to adhere to the rigid rule or theory of law referred to.

(*r*) [1908] P. 46.

(*s*) *Stathatos v. Stathatos*, [1913] P. 46, 51, *per* Bargrave Deane, J.

"Holding, therefore, that I have jurisdiction in this respect I grant "the petitioner a decree of dissolution, with costs against the respondent" (*t*).

When one judge hopes that his decision will not be followed as a precedent until affirmed by the Court of Appeal, when an even more distinguished colleague cites the admitted injustice of the existing state of the law as the sole ground on which he can support his claim for possessing jurisdiction to deal with the case before him, the natural comment is that hard cases make bad law, and that each of two respected magistrates is exerting a jurisdiction neither conferred upon him by Parliament nor established by a line of decisive judicial precedents.

(B) **As to the Jurisdiction of the Court to Declare the Nullity of Marriage.**—This jurisdiction, in so far as it exists independently of statute (*u*), must be brought within Rule 65. But this jurisdiction under that rule does not necessarily depend upon the domicile of the parties, but normally arises from one of two different circumstances or conditions, namely, first, that the marriage which the Court is asked to declare a nullity was celebrated in England; or, secondly, that the respondent is resident in England. In either of these cases it would seem that the Court has jurisdiction to entertain a suit brought by the wife, or by the husband, whatever be the domicile of the husband. We need only concern ourselves here with the case in which the Court exercises jurisdiction on the ground that the marriage which it is asked to declare to be a nullity was celebrated in England. In one such case at any rate, though it has met with a good deal of censure, there is strong, if not decisive, authority in favour of the Court's jurisdiction.

H and *W* are both Portuguese subjects, and, though living in England, are before and at the time of their marriage domiciled in Portugal. They are first cousins, and by the law of Portugal marriage between Portuguese subjects being first cousins, without dispensation having been obtained from the Pope, is void wherever contracted. *H* and *W* marry in England before the registrar of the district of the City of London. At the time of the marriage *H* and *W* were domiciled in Portugal, and have continued to be so domiciled ever since. They have not obtained any dispensation from the Pope. *W* petitions to have the marriage declared a nullity. The Court of Appeal declares the marriage a nullity on the ground that, as the

(*t*) *De Montaigne v. De Montaigne*, [1913] P. 154, 158, 159, *per* Sir Samuel Evans, Pres.

(*u*) For this statutory jurisdiction see Rule 66, p. 305, *ante*, based on the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93).

parties, being Portuguese subjects and domiciled in Portugal, are by the law of their Portuguese domicile under a personal disability to contract a valid marriage, it ought, though celebrated in England, to be declared void. This is, in substance, the celebrated case of *Sottomayor v. De Barros* (No. 1) (*x*). It has often been criticized, and its effect has to a limited extent been curtailed by the subsequent case of *Sottomayor v. De Barros* (No. 2) (*y*), but it has never been reversed or overruled. Until it is overruled by the House of Lords it ought to stand as an admitted part of the law of England.

The reasons, however, which have diminished from one point of view, and have, it is submitted, from another point of view, increased the weight to be attached to *Sottomayor v. De Barros* (No. 1), can be appreciated only by weighing carefully the joint effect of the following three cases: *Simonin v. Mallac* (*z*), *Sottomayor v. De Barros* (No. 1), and *Sottomayor v. De Barros* (No. 2).

Simonin v. Mallac was decided in 1860. It determines that where *H* and *W*, each of them being a French citizen domiciled in France, are under French law incapable of intermarrying without the consent of *H*'s father, and they do intermarry in England by a marriage perfectly valid according to the territorial law of England, but with full knowledge that such marriage will be held invalid by the French Courts, and the marriage is in fact subsequently declared invalid by the French Courts, the English Court has no power to grant a petition by the wife for a declaration of the nullity of the marriage. *Simonin v. Mallac*, in short, establishes, if taken alone, the principle that a marriage celebrated in England, and completely valid according to the territorial law of England, can never be declared invalid by an English Court, simply because it is invalid and is declared invalid by the Courts of a foreign country, *e.g.*, France, to which the parties belong at the time of the marriage both by nationality and domicile, and it would seem that this result would *à fortiori* ensue if the wife applied to the English Court not for a decree of nullity, but for divorce.

Sottomayor v. De Barros (No. 1), decided in 1877, seems at first sight to overrule *Simonin v. Mallac*, for it lays down that when *H* and *W*, though living in England, are each of them Portuguese subjects domiciled in Portugal, and are by the law of Portugal incapable of intermarriage, because they are first cousins and have not obtained any dispensation from the Pope, the English Court may declare such marriage invalid. But in point of fact *Sottomayor v. De Barros* does not overrule *Simonin v. Mallac*, but merely indicates

(*x*) (1877), 3 P. D. (C. A.) 1.

(*y*) (1879), 5 P. D. 94.

(*z*) (1860), 2 Sw. & Tr. 67.

an important limitation to its effect. Under the doctrine laid down in *Simonin v. Mallac* it appeared that questions of the validity of a marriage celebrated in England must be referred entirely to English law; in *Sottomayor v. De Barros*, following a distinction indicated in *Brook v. Brook* (a), there were excepted from this rule questions of capacity which were to be referred to the law of the domicile of the parties to the marriage, while parental assents were ruled not to be matters affecting capacity, but merely to pertain to the form of the marriage, and therefore to be governed by English law.

At the same time the Court of Appeal, while establishing the rule that capacity is regulated by the law of the domicile of the parties to the marriage, indicated a possible exception to the generality of the rule, leaving open the question whether the Court could have pronounced the marriage invalid if one of the parties had been a British subject domiciled in England. This dictum gave rise to *Sottomayor v. De Barros* (No. 2), which limits the effect of the earlier case by definitely deciding that, where one of the parties, *H* and *W*, viz., *H*, was at the time of the English marriage domiciled in England, while *W* continued domiciled in Portugal, the Court had no power to pronounce the English marriage invalid. But it is essential to bear in mind that though *Sottomayor v. De Barros* (No. 2) does limit the application of *Sottomayor v. De Barros* (No. 1), yet it leaves in force and supports the main principle established by the former case, that where both the parties to a marriage celebrated in England are subjects of, and domiciled in, a foreign country, e.g., Portugal, by the law of which they are incapable of inter-marriage, the Court has jurisdiction to pronounce the marriage invalid.

(C) **The Impossibility of Logically Reconciling the Judgments of English Courts concerning the Subject of this Note.**—This impossibility arises from two different circumstances. The first of these circumstances is the absolute incompatibility between the French doctrine that, as regards marriage at any rate, a Frenchman carries with him everywhere the law of France, and the English doctrine, that a marriage celebrated in England and legally valid according to the territorial law of England, must be held, by English Courts at any rate, to be valid, whatever be the nationality or the domicile of the parties. The second circumstance is of a different character, and arises from two misconceptions as to the rules governing the law of contract in cases which give rise to the so-called conflict of laws. The one is the belief certainly entertained by many English judges in the earlier part of the 19th century, that all

(a) (1861), 9 H. L. C. 193.

questions connected with the validity and the effect of a contract were determinable by the very simple rule of applying thereto the *lex loci contractus*, or the law of the country where a contract was made, and this doctrine, though not really held by Story, is certainly suggested by expressions to be found in his famous work on the *Conflict of Laws*, which did more to influence the opinion of English Courts than did any other work accessible to English lawyers till the publication of Westlake's *Private International Law* in 1858, which introduced Englishmen to the ideas concerning the conflict of laws to be gathered from Savigny. Gradually and slowly English lawyers admitted one modification to the foregoing rule, namely, that matters of procedure must be regulated by the *lex fori*, or, in other words, by the rules regulating the procedure of the Court in which a party took legal proceedings either as plaintiff or as defendant. Both of these rules supported the idea that a marriage contract celebrated in England ought to be governed as to its validity solely by the law of England. This dogma was, speaking generally, both convenient and true as regards the mere form of a marriage contract. It also had a good deal of truth as to everything which regards mere procedure in regard to the celebration of a marriage. But neither of these rules or principles is really without very great limitations applicable to the question of a person's capacity or legal power to enter into a contract of marriage. Gradually from the beginning of the 19th century, and probably from an earlier date, English Courts perceived the difficulty of bringing the legal capacity to marry under the head either of the *lex loci contractus* or of the *lex fori*. They perceived, though with difficulty, that it might possibly depend upon the law of the country where the parties marrying in England had their domicile, whilst they developed the certain and most beneficial rule that divorce jurisdiction ought exclusively to belong to the Courts of the country where married parties were domiciled, which in every case was the country where the husband was domiciled (see *Wilson v. Wilson* (1872), L. R. 2 P. & D. 435). But as to matrimonial capacity, at any rate, English lawyers and judges were in 1860 very much at sea. If we compare the judgment in *Simonin v. Mallac* and the judgment of the Court of Appeal in *Sottomayor v. De Barros* (No. 1), respectively, we may see that in each case the judgment of the Court was influenced by a different error. The decision in *Simonin v. Mallac* (influenced no doubt by *Warrender v. Warrender* (1835), 2 Cl. & F. 488) rests on the assumption that matrimonial capacity regarded as a matter of law ought to be governed by the *lex loci contractus*. On the other hand, the Court of Appeal in *Sottomayor v. De Barros* (No. 1) had come to believe that capacity to contract generally was governed by the law of a person's domicile,

whereas it is now all but admitted that in matrimonial matters (see Rule 158, p. 577) capacity to contract, often, if not always, depends upon a person's domicile, whereas capacity to enter into a contract of an ordinary mercantile character does more often than not depend upon the *lex loci contractus* (see Rule 158, Exception 1, p. 580). On the whole the error committed by the Court which gave judgment in *Simonin v. Mallac* was more serious than the error committed by the Court of Appeal in *Sottomayor v. De Barros* (No. 1). Still, as long as uncertainty remains as to the law applicable to a man's contractual capacity, it is all but impossible to frame consistent rules as to the proper way of dealing with a contract of marriage valid by the law of England, but invalid by the law of the country with which one, or both, of the parties might be connected by domicile or by nationality, and possibly by both domicile and by nationality. It may be worth while here to add that here, as in many other instances, the rules as to the conflict of laws which have grown up in England have been greatly affected by their having been originally decided with regard to the relation between England and Scotland after the union between the two countries in 1707. It was obviously desirable not to lay down rules which directly or indirectly militated against the moral unity of Great Britain. Now to pronounce a marriage celebrated in Scotland by persons, one or both of whom might be domiciled in England, invalid, because the consent of a parent required by the law of England, but not by the law of Scotland, had not been obtained, was certain to excite discontent in Scotland, and it is notable enough that in 1856 when the unity of Great Britain was secure, the Marriage (Scotland) Act, 1856 (19 & 20 Vict. c. 96), removed the inconvenience to English families of so-called Gretna Green marriages.

(D) **The Possible Methods for rendering the existing Law logically consistent.**—(1) An Englishwoman, or possibly any woman residing in England, might be allowed, though married, to acquire for herself a domicile separate from that of her husband who is domiciled in another country.

This change, which has been carried out in some of the States of the United States, no doubt would remove the grievance of a woman's being dealt with as an unmarried woman in France, whilst she is still treated as a married woman in England. But it would clearly tend towards breaking down the salutary rule that divorce can be granted only by the Courts of the country where a husband and wife are both domiciled.

(2) The Exception to Rule 63, as now stated in this work, might by an Act of Parliament or by judicial decision be made part of the

law of England. But here again it may be doubtful whether the grievance suffered by a very few married women is sufficient to justify a change in the law which certainly weakens the strength of the rule which maintains that divorce can be granted only by the Courts of the country where husband and wife are domiciled.

(3) A careful study of the *Simonin v. Mallac* cases, and the difficulties to which they have given rise, suggests that these difficulties might possibly be removed by a strict adherence enforced by Act of Parliament to two leading principles which this line of cases suggests, and which are in matter of fact with more or less strictness at present adhered to by English Courts.

First principle.—The divorce jurisdiction of the Court should depend wholly on the law of domicile. The Divorce Court should always have jurisdiction to divorce a husband and wife who at the time when the proceedings for divorce begin are domiciled in England, and have no jurisdiction to divorce any persons who at that time are not domiciled in England, and further the domicile of the wife should, at any rate in regard to divorce, always be the same as and change with the domicile of the husband. This principle is at present (subject to very slight exceptions) adhered to by the law and by the Courts of England (see Rule 62 and Rule 63, pp. 285, 291, *ante*). The strict adherence to it has two great and obvious advantages: It ensures that as far as English Courts and the Imperial Parliament can do so, the maintenance of the salutary principle that divorce jurisdiction belongs exclusively to the 'country where the parties to a divorce suit are domiciled at the time when proceedings are commenced. It further prevents the English Courts from the necessity of dealing from the point of view of divorce with such a case as *Simonin v. Mallac* and *Sottomayor v. De Barros* (No. 1), and thereby prevents English Courts from even attempting to divorce persons who both by nationality and by domicile belong to another country, *e.g.*, France or Portugal.

Second principle.—The jurisdiction of the Divorce Court to declare a marriage invalid is based in many cases upon the marriage having taken place in England, or in other words, to use an expression already employed, upon the marriage being an English marriage. Here again we are simply re-stating an admitted rule of English law (*b*). But this principle ought to be extended so as clearly to meet cases such as *Stathatos v. Stathatos* and *De Montaigne v. De Montaigne*. This end would be gained by enacting that where an English marriage takes place and the wife is at the time of the marriage domiciled

(b) See Rule 65, p. 300, *ante*.

in England, and the husband either has then or afterwards acquires a foreign domicile, and the English marriage is by the law of such foreign domicile declared to be invalid, the Divorce Court shall have jurisdiction on the petition of the wife to declare the marriage invalid. But the Divorce Court in granting such a decree of nullity should take into account the justice of so granting it or not.

The advantage of thus, on the one hand, clearly separating divorce jurisdiction from jurisdiction to declare a marriage a nullity is immense. It gives to a woman who, as in *De Montaigne v. De Montaigne*, is placed without her own fault in the position of being treated as a married woman in England and an unmarried woman in France practically all the advantage she now seeks from petitioning for a judgment of divorce, and it in no way shakes the principle that divorce jurisdiction ought wholly and in every country to depend upon the domicile of the parties to a divorce suit. Add further, that the suggested solution of the difficult question how to deal with the fact that an English marriage perfectly valid in England, is often, and has often, been declared invalid, *e.g.*, in France, is in reality suggested by English cases. In by far the greater number of the *Simonin v. Mallac* cases the application made to an English Court was originally either exclusively or alternatively an application not to grant a divorce, but to pronounce an English marriage, which has been deprived of its proper effect in France by the law of France, to be invalid.

This third way of amending or re-stating the law would be best carried out by a statute, but it might conceivably be carried through either by judicial legislation, *e.g.*, a judgment of the House of Lords, or conceivably by a Rule of Court with regard to jurisdiction in the shape of a re-statement of the rules regulating the service of a writ in proceedings for the granting of a divorce or for the declaration of nullity of a marriage if the authority of the judges to make Rules of Court is wide enough to embrace a case which in substance is certainly a change in the jurisdiction of the Divorce Court.

NOTE 14.

EXTENSION OF DIVORCE AND NULLITY JURISDICTION.

THE MATRIMONIAL CAUSES BILL, 1921.

The Matrimonial Causes Bill, 1921, passed the House of Lords, but could not be disposed of in the House of Commons for lack of time. The Bill was intended to introduce three changes of importance in the existing law as to jurisdiction in matters of Divorce

and Nullity of Marriage. These changes, though they are not yet part of the law of the land, are very likely to become part of a future Act of Parliament; they are certainly of importance as indicating the trend of opinion, and therefore may with advantage to our readers be here noticed.

(1) Recognition of divorces granted in British possessions on the ground of residence.

It is proposed by the Bill, Clause 10 (1), to provide that:—

“Where a British subject domiciled in England or Wales is resident in any British possession outside England and Wales, and has obtained from a Court of competent jurisdiction in that possession a decree or order of divorce, he may apply to the High Court to register that decree or order, and the Court, if satisfied that the decree or order was made upon the ground of adultery, shall register the decree or order, and the decree or order shall thereupon have effect and be treated for all purposes of the Matrimonial Causes Acts, 1857 to 1921, as though it were a decree nisi made by the High Court.”

The terms of the proposed enactment are not free from some obscurity. But the purpose of the Act clearly is to provide for the recognition in England of divorces granted in any other part of the British possessions (including, doubtless, Scotland), even though the parties thereto are not domiciled in England, in cases where the local law authorizes the local Courts to grant decrees on the ground of mere residence. The immediate difficulty which the clause is intended to meet is the fact that in India and in certain Colonies divorce jurisdiction is exercised without strict regard to domicile, and it has been thought that it is undesirable to refuse, at any rate where divorce is granted on the ground of adultery, to accord recognition to such divorces in England.

It is, however, open to serious doubt whether the gain to be derived from the proposed enactment is at all commensurate with the disadvantage of varying in this manner the well-established principle that divorce jurisdiction is properly based on domicile. The restriction of the clause to the case of British subjects domiciled in England is strictly anomalous as nationality is, in the view of English law, irrelevant in matters of divorce jurisdiction; the provision ought certainly to have been made applicable to all persons domiciled in England, irrespective of their nationality. The restriction, moreover, of the cases of recognition to divorces granted on the ground of adultery only introduces an invidious distinction between classes of colonial divorces, so that persons, who are regarded in the view of the local legislation as being with equal justice divorced, would be

in England discriminated as persons duly divorced and persons illegally divorced. It is inevitable, further, that the concession made in respect of British possessions should ultimately be extended to foreign countries with the result of increased confusion. To this may be added that English Courts have hitherto, to their great advantage, treated any divorce granted by the Courts of a country where the parties thereto are domiciled as being valid, and have thus been freed from the necessity of considering whether or not the cause for which divorce has been obtained in the country where the parties are domiciled would have been considered a sufficient cause for divorce had they been domiciled in England. The precedent set by this proposed enactment would almost certainly impose in the long run upon the English Courts the duty of considering whether a divorce granted by the Courts of a British Colony or by the Courts of a foreign country to persons there domiciled might not be invalid on the ground that the ground on which it was granted is one not sanctioned by English law.

From a practical point of view there seems no adequate need for the change proposed. As regards the oversea possessions and Scotland divorce jurisdiction is only exercised in respect of domiciled persons, save in cases where a husband has deserted his wife and changed his domicile; and such cases would be sufficiently provided for by the next proposed amendment. In regard to India (c) it has been held that the existing law does not authorize the divorce of persons not domiciled in India, and though authority to do so might be given by the legislature there seems no ground on which the general authority to do so could be justified.

(2) Right of a deserted wife whose husband has changed his domicile to petition for divorce in the Courts of his former domicile.

It is proposed by the Bill, Clause 10 (2), to provide that:—

“Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and was immediately before the desertion or deportation domiciled in England or Wales, her domicile shall for all purposes of the Matrimonial Causes Acts, 1857 to 1921, be treated as the same as it was immediately before the desertion or deportation.”

This would give statutory validity to the exercise of jurisdiction by English Courts in favour of a wife deserted by her husband or deported as an undesirable alien, provided that her domicile were English preceding such desertion or deportation. There are dicta

(c) See Note 17.

in favour of the existence of such a jurisdiction on the part of the English Courts, but in the absence of any course of practice in favour of its exercise (*d*) the existence of the power must be deemed doubtful. Unquestionably the proposal meets a real hardship, but at the same time it must be noted that if the acquisition by the wife of a separate domicile for this purpose is conceded, it will be increasingly difficult to uphold the present convenient rule that the domicile of any married woman, not actually divorced from her husband, is the same as his domicile.

If the exception is admitted, presumably it would be admitted by parity of reasoning that divorce granted to deserted wives in British possessions or in Scotland (*e*) must be regarded as valid in the English Courts, and the chief ground for the first alteration in the law proposed in the Bill here criticized would disappear.

(3) Jurisdiction to annul marriages contracted by British women with foreigners on the ground of foreign decrees of nullity.

It is proposed by the Bill, Clause 10 (3), to provide that:—

“Where a woman who was a British subject domiciled in England or Wales at the time of her marriage has married a foreign subject, and such marriage is subsequently declared null and void by a Court of competent jurisdiction in the foreign country of which such husband is a subject, the High Court may pronounce a decree of nullity, notwithstanding that the marriage was valid according to the law of the place of celebration.”

This amendment would remove the necessity for pronouncing decrees of divorce in such cases as those of *Stathatos v. Stathatos* (*f*) and *De Montaigu v. De Montaigu* (*g*), a necessity arising from the fact that English law regards as valid any marriage celebrated according to the forms of English law in England, and includes among the matters of form parental assents, whilst foreign countries often require that their subjects shall, if married abroad, comply with the requirements of the foreign law. The solution adopted of empowering English Courts to grant decrees of nullity in these cases agrees with the rule suggested above (*h*). But there seems no adequate reason for extending, as is done in the proposed clause, the application of the power to a marriage celebrated anywhere instead of limiting it to the case of a marriage contracted in England.”

(*d*) See p. 827, *ante*.

(*e*) See p. 845, *post*.

(*f*) [1913] P. 46.

(*g*) [1913] P. 154.

(*h*) See Note 14, p. 834, *ante*.

NOTE 15.

CHETTI v. CHETTI AND EX PARTE MIR-ANWARUDDIN.

These two cases illustrate the treatment by English law of the effect of marriages, celebrated in England according to the forms provided by English law, between natives of British India, whose religious law sanctions their contracting polygamous marriages, and Englishwomen.

In *Chetti v. Chetti* (i) the defendant was a Hindu who, when living temporarily in England, had married an Englishwoman before a registrar. When he returned to India he did not take his wife with him, and from 1894 his desertion of her became complete. His wife took advantage of a short visit of her husband to England to petition for a judicial separation. The defence set up alleged, *inter alia*, that the defendant was domiciled in Madras, and also was a Vaisya, by the rules of which caste he was incapable of contracting a lawful marriage with any person not of that caste; so that his marriage in England to an Englishwoman was null and void.

This defence was rejected by the Court, which held that the case clearly fell within the doctrine laid down in *Sottomayor v. De Barros* (No. 2) (k), that the validity of a marriage celebrated in England between persons, one of whom is domiciled in England, while the other has a foreign domicile, is not affected by an incapacity existing under the law of the foreign domicile, but not under English law; the only distinction between the cases being, that in the earlier case the disability was one affecting the wife, while in the latter case it was one affecting the husband. But grave doubt was also thrown on the correctness of the doctrine that the husband was in any true sense under a disability under the law of his domicile. There was, it was pointed out, a clear distinction between a disability grounded on domicile, affecting all persons domiciled in India, and a disability based on the personal law of any person as recognized for certain purposes under statute as valid in India. The latter form of disability was really not comparable with a disability resting on domicile, but should be regarded in England as analogous to a religious disability, such as that of a monk, to which no recognition was accorded in England (l).

In *Anwaruddin's case* (m) an Indian student, a Mohammedan by

(i) [1909] P. 67.

(k) (1879), 5 P. D. 94.

(l) See Rule 136, p. 500, *ante*.

(m) *R. v. Superintendent Registrar of Marriages for Hammersmith, Ex parte Mir-Anwaruddin*, [1917] 1 K. B. (C. A.) 634. Compare also *R. v. Naguib*, [1917] 1 K. B. 359, in which the validity of such a divorce by an Egyptian was raised but not decided.

religion, married in 1913, before a registrar in England, an Englishwoman. Disputes arose, and the wife left her husband, who obtained *ex parte* in her absence a decree for restitution of conjugal rights from the City Civil Court of Madras, where he was domiciled. Anwaruddin then came to England, where his wife filed a petition in the High Court for a judicial separation, but this petition was later dropped. Anwaruddin then proceeded, when in England, to declare by Talāk, *i.e.*, by a writing under his hand in accordance with Mohammedan religious law, that his marriage with his wife was dissolved, but he also sought to petition for divorce in the High Court. The registrar, however, refused to admit the petition, and Bargrave Deane, J., on appeal, upheld his refusal primarily on the ground that, as Anwaruddin was domiciled in Madras, there was no jurisdiction. He also, however, *obiter* treated the divorce by Talāk as dissolving the marriage. Fortified by this dictum, Anwaruddin applied for a *mandamus* and obtained a rule *nisi* calling upon the Superintendent Registrar of Marriages for Hammersmith to issue his certificate and licence for his marriage with another Englishwoman, the registrar having declined to issue a certificate in view of the subsistence of the earlier English marriage.

The refusal of the registrar to issue a certificate was upheld by the King's Bench Division (Reading, L.C.J., Darling and Bray, JJ.), and on appeal by the Court of Appeal (Swinfen Eady and Bankes, L.JJ., and Lawrence, J.), the judgments in both cases being unanimous. It was held that there was nothing to prevent a Mohammedan entering into a monogamous marriage in England, to which the incidents of a monogamous marriage necessarily attached (*n*). It was further held that such a marriage could not be dissolved by the act of one of the parties thereto so far as England was concerned, such a mode of dissolution being incompatible with the essentials of marriage as understood by English law (*o*). Lord Reading added that, even if the decree of dissolution had been rendered by a Court of competent jurisdiction in the country of domicile, it must not be assumed that such a decree, if based on Talāk, would be accepted by English Courts as dissolving the marriage (*p*). This conclusion, though not necessary for the purpose of deciding the case at issue, seems clearly correct; it is true that English Courts will recognize the validity of divorces pronounced in the country of domicile

(*n*) See Lord Reading's judgment at p. 640.

(*o*) The dictum of Lord Brougham in *Warrender v. Warrender* (1835), 2 Cl. & F. 488, 534, was cited and approved; see Bray, J., at p. 653; Swinfen Eady, L. J., at p. 659.

(*p*) At p. 642.

on grounds which would not justify divorce in England (*q*), but they have never recognized divorces granted at the mere pleasure of one of the parties to the marriage. In other words, a marriage which is terminable at the pleasure of either party could never be regarded as a true marriage such as is the subject of rules of private international law.

NOTE 16.

EFFECT OF FOREIGN DIVORCE ON ENGLISH
MARRIAGE.

(A) *State of the Law before 1858*.—Till the year 1858, when the Matrimonial Causes Act, 1857, came into operation, our Courts inclined towards the contractual theory of divorce (*r*), and on the whole held that the right to divorce depended on the terms of the marriage contract (*s*). From this theory, combined with the fact that no means then existed by which a marriage could be dissolved in due course of law by the English Courts (*t*), arose two doctrines which, on the whole, received the approval of English tribunals.

The first doctrine was that no foreign Court could, under any circumstances, pronounce a divorce which should be held valid in England of the parties to an English marriage. This view, which was a legitimate inference from the premises on which it was based, may be termed the received doctrine. No decision can be cited which shows that our Courts ever, prior to 1858, recognized the right of foreign tribunals to dissolve an English marriage, and several decisions exist which can hardly with fairness be interpreted as consistent with the opinion that an English marriage was, under any circumstances, dissoluble (*u*). But, though the dogma that an English marriage was indissoluble was the received opinion of the Courts, it was one which never obtained decisive judicial sanction. The cases which could be cited in its support do not go further than showing that our Courts would not recognize a divorce when the parties to it were not domiciled in the country where the divorce was obtained, and it has even been maintained that the position, that a foreign tribunal can dissolve an English marriage when the parties thereto are domiciled within its jurisdiction, is consistent with all English decisions, though

(*q*) See Rule 98, p. 416, *ante*; *Pemberton v. Hughes*, [1899] 1 Ch. (C. A.) 781.

(*r*) See Note 12, *ante*.

(*s*) *Tovey v. Lindsay* (1813), 1 Dow, 117, 131, 140.

(*t*) *Wilkinson v. Gibson* (1867), L. R. 4 Eq. 162, 168.

(*u*) *Lolley's Case* (1812), 2 Cl. & F. 567; *McCarthy v. De Caix* (1831), 2 Cl. & F. 568.

it may not be consistent with the resolution of the judges in *Lolley's Case* (x). Though, in short, before 1858, the contractual theory was, on the whole, predominant, yet it never received full legal recognition, while its effects were counteracted by the partial influence of what we have termed the status theory of divorce (y).

The second doctrine resulting from the contractual theory was that every marriage celebrated in England was an English marriage, and, therefore, indissoluble by the decree of a foreign tribunal. Hence it was on one occasion decided that the marriage in England of a Dane domiciled in Denmark could not, as far as effects in England went, be dissolved by a Danish divorce. The conclusion, however, that every marriage celebrated in England was an English marriage, and, therefore, indissoluble, was erroneous, even on the contractual theory of divorce. For, even if the right to divorce depends on the terms of the marriage contract, these terms are fixed by the law of the country subject to which the marriage is made, which, no doubt, is in general the law of the country where the marriage is celebrated, but may be the law of the country where the husband is domiciled. This was perceived long before the passing of the Matrimonial Causes Act, 1857, and the better, though not the predominant, opinion became, that the marriage in England between parties of whom the husband was domiciled, for example, in Scotland, was not an English but a Scottish marriage, and, therefore, not affected by the rule making English marriages indissoluble (z). The state of the law, therefore, prior to 1858, may be thus summed up.

First. An English marriage was generally held to be indissoluble, though some lawyers inclined to the opinion that when the parties to such a marriage were domiciled in a foreign country they might obtain a divorce which would be held valid in England.

Secondly. The Courts often identified a marriage celebrated in England with an English marriage, but the better opinion was that the character of a marriage depended on the domicile of the husband at the time of its celebration.

(B) *State of the Law since 1858.*—Our Courts have, since 1858, surrendered the theory that an English marriage cannot be dissolved by a foreign divorce, and admit that where the parties to such a marriage are *bonâ fide* domiciled in a foreign country, the tribunals of that country have jurisdiction to pronounce a divorce which will be held valid in England. This view of the present state of the law

(x) *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 85.

(y) *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Conway v. Beazley* (1831), 3 Hagg. Ecc. 639.

(z) *Warrender v. Warrender* (1835), 2 Cl. & F. 488. See, now, *Harvey v. Farnie* (1882), 8 App. Cas. 43.

has been put forward throughout this treatise (a), and can be maintained with confidence on the following grounds:—

First. The Matrimonial Causes Act, 1857, strikes at the root of the theory that no English marriage can be dissolved by a foreign Court. For the Act, by providing regular means for divorce, disposes of the contention that an English marriage is a contract entered into on the terms that it shall never be rescinded; and further, being applicable to marriages made before the time when the Act passed, amounts to something like a legislative declaration that the right to divorce does not depend upon the terms of the marriage contract.

Secondly. Even independently of the effect of the Act, English judges have, in modern times, shown an inclination to reject the contractual theory of divorce (b), and, at the same time, have, on one occasion, at least, distinctly repudiated what we have termed the penal theory (c).

Thirdly. It is now clearly decided that the Courts of a country where a husband and wife are domiciled at the time of proceedings for divorce have jurisdiction, and, subject to certain very limited exceptions, have exclusive jurisdiction (d) to divorce such husband and wife. Hence a divorce pronounced by a divorce Court of a foreign country where the parties to an English marriage are domiciled will dissolve an English marriage and be held valid in England, and this even though the divorce is granted for a cause which would not be held a ground for divorce under the law of England (e).

A foreign divorce, therefore, if pronounced by a divorce Court of the country where the parties to an English marriage are domiciled, will, under the present state of the law, dissolve an English marriage and be held valid in England.

(C) *Jurisdiction of Scottish Courts to dissolve an English marriage?*—The Scottish Courts adopting in the main the “penal” theory of divorce (f) have never admitted that the fact of a marriage being celebrated in England, or of its being in strictness an English marriage, deprives them of jurisdiction to grant a divorce (g).

(a) See Rule 98, p. 416, *ante*.

(b) *Mordaunt v. Mordaunt* (1870), L. R. 2 P. & D. 109, 127; *Shaw v. Gould* (1868), L. R. 3 H. L. 55, 90, 91.

(c) *Mordaunt v. Moncrieffe* (1874), L. R. 2 Sc. Ap. 374.

(d) See Exception to Rule 63, p. 294, *ante*, and Exception to Rule 99, p. 422, *ante*.

(e) *Scott v. Attorney-General* (1886), 11 P. D. 128; *Bater v. Bater*, [1906] P. (C. A.) 209; *conf. In re Stirling*, [1908] 2 Ch. 344.

(f) See p. 824, *ante*; *Utterton v. Tewsh* (1811), Ferg. Div. Cases, 23; *Christian v. Christian* (1851), 13 D. 1149.

(g) 2 *Fraser*, *Treatise on Husband and Wife* (2nd ed.), pp. 1276—1294; *Warrender v. Warrender* (1835), 2 Cl. & F. 488.

They have further maintained that jurisdiction is given by:—

(1) the commission in Scotland of a divorce offence (*locus delicti*) and the personal citation of the defendant (*h*); or

(2) the matrimonial domicile of the parties in Scotland, being a domicile of a less permanent character than the domicile of succession (*i*); or

(3) the *bonâ fide* domicile of the parties in Scotland.

The English Courts have never conceded the validity of all the claims put forward by Scottish tribunals. They showed at one time, as already pointed out (*k*), a disposition to maintain that every marriage celebrated in England was an English marriage, and that a Scottish divorce could not dissolve an English marriage as regards its effect in England (*l*), and have since no less than before the passing of the Matrimonial Causes Act, 1857 (*m*), strenuously maintained that no decree of a Scottish Court can divorce the parties to an English marriage, unless they are domiciled in Scotland at the time of the divorce. This difference of view as to jurisdiction in the matter of divorce has led to some practical inconvenience and to much debate. The result, however, of a controversy which has now lasted for years is not altogether unsatisfactory, and may be thus summed up:—

The Scottish Courts have surrendered the doctrine that either the *locus delicti* or “matrimonial domicile” gives jurisdiction in matters of divorce (*n*). It is, however, perfectly clear that the Scottish Courts, though they have surrendered other grounds of jurisdiction, claim jurisdiction to dissolve the marriage of any persons domiciled in Scotland (*o*).

As the English Courts have now conceded that an English marriage may be dissolved by the tribunals of any country where the parties are domiciled at the time of their divorce (*p*), it follows that a Scottish divorce will be held valid in England if the parties to the marriage are at the time of the divorce domiciled in Scotland, and unless they are so domiciled will in general not be held valid.

(*h*) 2 Fraser (2nd ed.), pp. 1288, 1289.

(*i*) *Shields v. Shields* (1852), 15 D. 142; *Jack v. Jack* (1862), 24 D. 467; *Hume v. Hume* (1862), 24 D. 1342; *Dombrowitzki v. Dombrowitzki* (1895), 22 R. 906; 2 Fraser, pp. 1276—1283; Maclaren, Court of Session Practice, pp. 57, 58.

(*k*) P. 841, *ante*.

(*l*) *Lolley's Case* (1812), 2 Cl. & F. 567.

(*m*) *Shaw v. Gould* (1868), L. R. 3 H. L. 55.

(*n*) *Pitt v. Pitt* (1864), 4 Macq. 627; *Stavert v. Stavert* (1882), 9 R. 519; *Low v. Low* (1891), 19 R. 115; *La Mesurier v. Le Mesurier*, [1895] A. C. 517, 533—535; *Barkworth v. Barkworth*, [1913] S. C. 759.

(*o*) *Warrender v. Warrender* (1835), 2 Cl. & F. 488; *Carswell v. Carswell* (1881), 8 R. 901, shows that jurisdiction will be exercised even if a man acquires a domicile in order to attain a divorce.

(*p*) See Rule 98, p. 416, *ante*; and *Bater v. Bater*, [1906] P. (C. A.) 209.

One case only of doubt remains; the Scottish Courts, while they adhere to the doctrine of domicile as the basis of divorce, hold that, where the husband and wife have been domiciled in Scotland and a matrimonial offence has been committed there which would justify divorce, the husband cannot by change of his domicile evade the jurisdiction of the Scottish Courts to dissolve his marriage (*q*). It is uncertain whether or not the exercise of divorce jurisdiction in such a case would be recognized by English Courts, but according to the strict rule of domicile it appears that such divorces are not entitled to recognition (*r*).

NOTE 17.

DIVORCES UNDER THE INDIAN DIVORCE ACT, &c.

The Indian Divorce Act, No. IV. of 1869, authorizes Indian Courts to make decrees of dissolution of marriages solemnized in India "in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition" (sect. 2). It further provides that Indian Courts shall in the exercise of their jurisdiction under the Act "act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principle and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief."

At the time when this Act was passed by the Indian Legislature under the legislative authority conferred by the Indian Councils Act, 1861 (24 & 25 Vict. c. 67), the basis of divorce jurisdiction in England was yet undecided, and there is no doubt that it was intended to authorize Indian Courts to grant divorces on the score of mere residence, and the Indian Courts have acted on that basis. When, however, the rule as to jurisdiction in divorce was based on domicile by the judgment of the Privy Council in *Le Mesurier v. Le Mesurier* (*s*), and the same rule was treated by the House of Lords as obviously applicable to divorce jurisdiction in the English High Court, it seems clear that the practice of the Indian Courts should have been brought into harmony, in accordance with sect. 7 of the Act of 1869, with the practice of the English Court. This

(*q*) See *Redding v. Redding* (1888), 15 R. 1102; *Pabst v. Pabst* (1898), 6 Sc. L. T. 117; *Manderson v. Sutherland* (1899), 1 F. 621.

(*r*) If jurisdiction in the case of a deserted wife is finally recognized in England (see p. 837, *ante*), it would follow that a similar jurisdiction would properly be allowed to foreign Courts.

(*s*) [1895] A. C. 517.

deduction, however, was not drawn by the Indian Courts, which continued to exercise a jurisdiction based on residence.

The validity of such divorces was directly challenged in England for the first time in 1921 in the case of *Keyes v. Keyes and Gray* (t), which was a petition for divorce on the ground of adultery. The petitioner was married in India in 1916 to the respondent; in 1918 he was granted by the Chief Court of the Punjab a decree of dissolution of marriage with damages against the co-respondent. But, not being satisfied of the validity of the divorce, he petitioned the English Court for divorce, on the ground of his domicile in England, and the incapacity of the Indian Court to pronounce a valid decree of dissolution of marriage, where the parties were not domiciled in India. In support of the validity of the divorce it was contended that unless the Act of 1869 were allowed to operate with regard to persons not domiciled in India, its chief purpose would be gone, as comparatively few of those to whom it was intended to apply were legally domiciled in India. The decision of Sir H. Duke, President, was in favour of the petitioner, on the ground that the authority which was conferred by the Indian Councils Act, 1861, on the Indian Legislature did not extend to the making of a law to empower Courts in India to decree dissolution of the marriages of persons not domiciled within their jurisdiction.

Though some doubt is possible as to the precise *ratio decidendi* of the case (u), there seems no real doubt as to the impossibility of English Courts recognizing save under statutory authority divorces granted on any other basis than that of domicile. The rule has inconvenient results with regard also to divorces granted by Courts in the Dominions in which jurisdiction is recognized to exist not merely in the case of persons domiciled, but in the case of wives whose husbands have deserted them and changed their domicile (x), and also with regard to divorces granted on the same ground by Scottish Courts. But without legislation for the purpose it does not seem that such divorces can properly receive recognition from English Courts (y).

As regards marriages hitherto dissolved under the jurisdiction conferred by the Indian Divorce Act, 1869, in cases where the parties

(t) 37 T. L. R. 499; [1921] P. 204.

(u) It seems implausible to hold that the Indian Legislature had not power to confer authority to divorce residents; it was sufficient to hold that its legislation had no extra-territorial validity.

(x) See Keith, *Responsible Government in the Dominions*, pp. 1242—1245, and the New Zealand case of *Poingdestre v. Poingdestre*, 28 N. Z. L. R. 604; see also the New Zealand Divorce and Matrimonial Causes Amendment Act, 1919, No. 53.

(y) See p. 837, *ante*.

were at the time of the commencement of the proceedings domiciled in England or any other part of the United Kingdom, validity has been given retrospectively to any decree of divorce and any order made by an Indian Court in relation to any such decree, provided the proceedings were commenced before July 1st, 1921, by the Indian Divorces (Validity) Act, 1921 (11 & 12 Geo. 5, c. 18). The Act, however, has no application to future divorces.

NOTE 18.

THE THEORETICAL BASIS OF THE RULES AS TO THE EXTRA-TERRITORIAL EFFECT OF A DISCHARGE IN BANKRUPTCY.

The theoretical basis on which rest the Rules (*z*) as to the extra-territorial effect of a discharge in bankruptcy is hard to discover.

They are not grounded on the jurisdiction of the Court to adjudge a debtor bankrupt, for they are in no way affected by his domicile (*a*). They do not rest wholly upon the territorial authority of the sovereign by whom a bankruptcy law is enacted, for, if they did, a discharge in bankruptcy would logically in no case have any extra-territorial operation. They do not, lastly, depend wholly upon the proper law of the contract under which the liability from which a bankrupt is discharged has arisen (*b*), for no reference to the proper law of a contract can explain how it is that a discharge under an Act of the Imperial Parliament is in England a discharge from a debt owing by a Frenchman to another Frenchman which is both contracted and payable in France, nor generally how it is that a discharge in bankruptcy under the law of a given country is in that country treated as a discharge from any debt wherever incurred or wherever payable.

The explanation, if not the logical justification, of the effect given by our Courts to a discharge in bankruptcy is to be found in the influence exerted on the minds of English judges by two different, though not inconsistent, views of the same legal transaction.

First. A discharge may be looked upon as a command given by the sovereign of a country to the Courts thereof that they shall treat a bankrupt *debtor* as freed from liability for his debts. If the matter be regarded from this point of view, the operation of a discharge

(*z*) See Rules 126—128, pp. 477—483, *ante*.

(*a*) *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399.

(*b*) The influence of the "proper law" (see Rule 155, p. 572, *ante*) is treated as the decisive consideration in *Gibbs v. Société Industrielle*, and other cases.

depends upon the territorial limits assignable to the authority of the legislature or sovereign by whose command the discharge is given. Hence a bankrupt is freed from liability throughout the whole of a sovereign's territory from every debt wherever contracted or payable. This is the explanation of Rule 128 (c), and in general terms of the effect of a discharge within the country under the law of which it is obtained on debts contracted in other countries (d).

Secondly. A discharge may, from another point of view, be looked upon as a mode in which a debtor is freed from his liability in accordance with the contract between the debtor and his creditor, or rather as a mode of terminating liability under a contract which was contemplated as possible by the parties at the time they entered into their agreement, or, in other words, at the time when the contract was made (e).

On this latter view of the matter, the extra-territorial operation of a discharge in bankruptcy must depend on the result of the inquiry whether the law under which the debtor is made bankrupt is also the proper law of the contract (f). If an affirmative answer be given, the discharge ought to be valid everywhere; if a negative answer be given, the discharge ought to have, at any rate, no extra-territorial operation. And this, it is conceived, is the predominant doctrine of English Courts as to any discharge which does not take place under an Act of the Imperial Parliament, and affords the explanation of Rules 126 and 127 (g). They lead to this result: viz., that a discharge under any bankruptcy taking place outside the United Kingdom is a valid discharge everywhere from any debt which is contracted [or probably which is payable] in the country of the bankruptcy (h), and is not a discharge from any debt which is neither incurred nor payable in such country (i); which comes round, in other words, to the statement that the validity of a discharge depends upon its being a release from the debt under the proper law of the contract.

There is, it is true, as already pointed out, some question whether a discharge under the law of a country where a debt is payable, but is not contracted, has an extra-territorial effect (k). But this difficulty, such as it is, arises from the doubt which runs through the English

(c) See pp. 483—485, *ante*.

(d) See *Ellis v. M'Henry* (1871), L. R. 6 C. P. 228.

(e) See *Gibbs v. Société Industrielle* (1890), 25 Q. B. D. (C. A.) 399, 405, 406, passage from judgment of Esher, M. R., cited pp. 481, 482, *ante*.

(f) As to meaning of "proper law of contract," see Rule 155, p. 572, *ante*.

(g) See pp. 477, 480, *ante*.

(h) See Rule 126, p. 477, *ante*.

(i) See Rule 127, p. 480, *ante*.

(k) See pp. 478, 479, *ante*.

law of contract whether, when the law of a country where a contract is made (*lex loci contractus*) and the law of the country where it is to be performed (*lex loci solutionis*) are different, the *lex loci solutionis* is or is not the proper law of the contract; and it is very characteristic of English law that the *lex loci contractus* should, in reference to the effect of a discharge, be constantly assumed to be the proper law of the contract.

But the truth is that, in maintaining the extra-territorial effect of a discharge in accordance with the *lex loci contractus*, English lawyers have probably been influenced by both the views which may be taken of the nature of a discharge (*l*). If the discharge be looked upon as the command of a sovereign, it may well be held that debts incurred within his territory are at once extinguished by his order, or, in other words, that (to take a particular case) an English law can extinguish English debts. If, on the other hand, a discharge be regarded in the light of a release from liability in accordance with the terms of a contract, then the *lex loci contractus* being, according to the doctrine of English law, presumably, at any rate, the proper law of a contract, it follows that a discharge under the law of the country where a debt is incurred is a discharge in accordance with its proper law, and therefore extra-territorially valid.

However this may be, the extra-territorial effect of a discharge in bankruptcy can be explained, and can, it is submitted, be explained only by keeping in view the two-fold character of a discharge as the command of a sovereign and a mode of release under the terms of a contract.

NOTE 19.

LEGITIMATION.

Question.—Do English Courts ever in strictness admit the legitimacy of a person born out of lawful wedlock ?

To this question two different answers have been given:—

First answer. English Courts do not in strictness admit the legitimacy of any person born out of lawful wedlock.

This answer was at one time, at any rate, plausible. The Scottish

(*l*) A different view is suggested by the judgment of Pollock, C. B., in *Armani v. Castrique* (1844), 13 M. & W. 443, 447, where the extra-territorial effect of a discharge is based on the view that the goods of the bankrupt all over the world are vested in the assignee, and therefore it would be unjust to take the bankrupt's property in a foreign country and allow a foreign creditor to sue him in England. But this view rests on an assumption as to the effect of an English bankruptcy in foreign countries which has only limited validity. See Rule 81, p. 364, *ante*.

cases, such as *Udny v. Udny* (*m*), are, it was argued, decisions as to Scottish law, and only determined that the son of a man domiciled in Scotland can, under Scottish law, be legitimated by the subsequent marriage of his parents. Nor do most of the cases regulating succession to movables go further than deciding that such succession is governed wholly by the law of the country where the deceased intestate or testator dies domiciled. An illegitimate child may, on this principle, claim movable property in England; if the law of his father's domicile entitles him to share in the succession (*n*). The fact, therefore, that a legitimated person may succeed to his father's movable property under the law of his father's domicile no more proves that our Courts recognize a legitimated person as legitimate, than the fact that an adopted child may, under the law of the deceased's domicile, succeed to movable property in England as an adopted son proves that English law recognizes relationship by adoption (*o*).

Second answer. Our Courts hold that the question of a child's legitimacy is to be determined by the law of the father's domicile at the time of the child's birth, taken together with the law of the father's domicile at the time of the subsequent marriage of the child's parents, and, when a person is legitimated under these two laws, fully admit his legitimacy.

This, it may now be laid down with confidence, is the right reply to a question which not many years ago did not admit of a perfectly certain answer.

D, an unmarried woman, died intestate and domiciled in England. *A*, the child of *D*'s brother, was born before her father's marriage, but whilst he was domiciled in Holland, and was, whilst *A*'s parents were still domiciled in Holland, legitimated there by their marriage. It was held by the Court of Appeal that *A* was entitled, as next of kin, to succeed to the movable property of *D*, *A*'s aunt, who, as already mentioned, died intestate and domiciled in England, or in other words, *A* was recognized in England as the legitimate child of her father, and as such entitled to succeed to the movable property of *A*'s aunt under the Statute of Distributions (*p*).

(*m*) (1869), L. R. 1 Sc. App. 441.

(*n*) *Dogliani v. Crispin* (1866), L. R. 1 H. L. 301. Compare *Atkinson v. Anderson* (1882), 21 Ch. D. 100.

(*o*) It is so recognized in America, see *Ross v. Ross* (1886), 129 Mass. 243, and strictly speaking there is no logical difference between the two cases. The recognition of legitimation and adoption has recently been contemplated in England. Cf. p. 37, note (*p*), *ante*.

(*p*) *In re Goodman's Trusts* (1881), 17 Ch. D. (C. A.) 266, which may be treated as overruling *Boyes v. Bedale* (1863), 1 H. & M. 798; 33 L. J. Ch. 283. Compare *Goodman v. Goodman* (1862), 3 Giff. 643; *In re Andros*. (1883), 24 Ch. D. 637, which apply the same principle in cases of bequest.

This case is decisive, for, since the intestate was an Englishwoman, dying domiciled in England, it is clear that her movable property could devolve only upon persons who were her legitimate next of kin under the Statute of Distributions, and therefore the decision in favour of A's claim was in the strictest sense a decision in favour of A's legitimacy (*q*). The principle involved in this decision has, since it was given, been carried a step further. Where real estate in England was devised by a testator to the children of D, who was domiciled in a foreign country, it was held that A, who was born whilst his father, D, was domiciled in such foreign country, and was legitimated by the subsequent marriage in such country of D with A's mother, was a legitimate child of D, and entitled to share in the English realty devised to D's children (*r*).

To the doctrine that a person legitimated under the law of his father's domicile is to be treated as strictly legitimate in England one objection may be raised.

The doctrine is, it may be urged, inconsistent with the rule, established by *Birtwhistle v. Vardill* (*s*), that a person born out of lawful wedlock cannot succeed as heir to real estate in England. This objection is untenable. *Birtwhistle v. Vardill* decides not that a person born out of lawful wedlock cannot, under any circumstances, be treated in England as legitimate, but, what is quite a different point, that he cannot, though legitimated, be heir to English realty (*t*).

NOTE 20.

LAW GOVERNING CONTRACTS WITH REGARD TO IMMOVABLES.

What is the law governing a contract with regard to immovables or land ?

Our inquiry primarily concerns the incidents or material validity (*u*) of a contract with regard to immovables. As regards the answer to our question two theories or doctrines are maintainable; they may be termed the doctrine of the *lex situs* and the doctrine of the proper law respectively.

(A) *Doctrine of the lex situs*.—Every question which can possibly arise with regard to rights over land must be answered in accordance

(*q*) See especially, judgment of James, L. J., 17 Ch. D. pp. 296—301.

(*r*) *In re Grey's Trusts*, [1882] 3 Ch. 88.

(*s*) (1835), 2 Cl. & F. 571; (1840), 7 Cl. & F. 895.

(*t*) See Rule 146, pp. 521, 522, *ante*.

(*u*) See Exception 1, p. 553, *ante*, and especially Rule 163, p. 618, *ante*.

with the *lex situs*; hence the validity and effect of a contract in respect of land is governed wholly by the *lex situs*. This appears, at any rate, to be the view maintained by Story (x). "The consent of the tribunals, acting under the common law, both in England and America, is, in a practical sense, absolutely uniform on the same subject [viz., the supremacy of the *lex situs* in regard to immovable property]. All the authorities, in both countries, so far as they go, recognize the principle in its fullest import, that real estate, or immovable property, is exclusively subject to the laws of the government within whose territory it is situate" (y). "The general principle of the common law is, that the laws of the place, where such property is situate, exclusively govern in respect to the rights of the parties, the modes of transfer, and the solemnities which should accompany them" (z). Though Story does not in so many words refer to contracts with regard to immovables, it is hardly possible to doubt that in his opinion every question whatever—including any inquiry as to the effect of a contract with regard to immovables—ought to be determined in accordance with the *lex situs*. This rule has many advantages. It is intelligible, it is simple, it avoids the necessity for nicely distinguishing between a contract and a conveyance, and in most cases it will undoubtedly be followed by English Courts.

(B) *Doctrine of the Proper Law*.—"Contracts relating to immovables are governed by their proper law as contracts, so far as the *lex situs* of the immovables does not prevent their being carried into execution" (a).

"A contract relating to immovables is governed and construed by the proper law of its obligation, ascertained in accordance with the principles enunciated in *Jacobs v. Crédit Lyonnais*," (b).

The doctrine enunciated by Mr. Westlake and Mr. Nelson is, therefore, that a contract with regard to immovables is not wholly governed by the *lex situs*, but is at bottom governed by the law to which the parties intended it to be subject, which law constantly is, but need not necessarily be, the same as the *lex situs*. The practical consequence would seem to follow that the excuses for the non-performance of such a contract may depend upon some other law, e.g., the *lex loci contractus*, and not upon the *lex situs*. Nor is there

(x) See p. 542, *ante*.

(y) Story, s. 428.

(z) Story, s. 424. Compare ss. 454, 430, 431, 435, 463.

(a) Westlake (5th ed.), s. 216, p. 310, citing *Campbell v. Dent* (1838), 2 Moore, P. C. 292.

(b) Nelson, p. 277. See, however, as to the effect of this case, p. 598, note (q), *ante*.

anything at bottom unreasonable in this. If *X*, an Englishman, agrees in England with *A* to do some act with regard to land in France, which he is unable to perform, there seems to be no injustice, if the parties really intended to be bound by the law of England, in holding that whether particular circumstances are or are not a legal excuse for non-performance of the contract by *X* should be determined in accordance, not with the law of France (*lex situs*), but with the law of England (*lex loci contractus*). Nor, again, is there anything inconsistent in this doctrine with the respect due to the authority of a foreign sovereign. No one maintains that an English Court can or will compel a person to perform, with regard to French land, a contract, the performance whereof is forbidden by French law; what is maintained is that, if *X* agrees in England with *A* to do a particular act in France, the question whether the non-performance is so far excused as to free him from liability to payment of damages is to be determined in accordance with English law.

The "doctrine of the proper law" is, however, open to criticism. Suppose the strongest case possible, viz., that a contract made in England with regard to land in France contained a clause which stated in so many words that the contract should be governed by English law. Would any provision in such a contract opposed to the law of France be valid? The land is in France. Nothing can be done in relation to the land which is not in accordance with French law. The clause, therefore, in so far as English law agrees with French law, is needless, and in so far as English law disagrees with French law, is an attempt to evade French law in respect of matters to be done in France, and therefore should not be enforced by the Courts of any other country (*c*). There is, at any rate, a great deal to be said in favour of Story's doctrine that all matters connected with land, including the effect of contracts in relation thereto, ought to be governed by the law of the country where the land is situate (*lex situs*).

But it cannot be held that Story's doctrine is consistent with the doctrines accepted by English Courts. Thus it has been held that the rights of husband and wife to land in England are governed not by the *lex situs*, but by the terms of a marriage contract into which under French law they are deemed to have entered upon their marriage in France (*d*). Similarly, English Courts recognize and will enforce, so far as they possess personal jurisdiction over the defendant, equitable mortgages of foreign land, which under the *lex*

(*c*) See Intro., General Principle No. II. (C), p. 34, *ante*.

(*d*) *In re De Nicols*, [1900] 2 Ch. 410; see Rule 150, Exception 2, p. 553, *ante*.

situs have no legal effect (*e*), and will apply the English rules of interpretation of contracts to a contract to sell land abroad, if they are satisfied that the contract was intended to be governed by English law (*f*). So also they will even decree foreclosure of mortgages of foreign lands on the principles of English law (*g*). Nor, after all, is there anything unfair in the procedure; the fact that the subject-matter of a contract, as distinct from a conveyance, is land situate abroad is not a sufficient reason that contracts according to English law should not be made regarding it (*h*).

(C) *Operation of the two doctrines.*—The doctrine of the *lex situs* and the doctrine of the proper law differ in their practical application far less than would at first sight appear, for whichever doctrine we adopt we must always bear in mind three considerations:—

First. No conveyance or transfer of land, or of an interest therein, which is not in accordance with the *lex situs*, will be held valid in England.

Secondly. The parties to a contract with regard to land do, as a matter of fact, generally intend the contract to be governed by the *lex situs*; the proper law, therefore, of the contract is in most instances the same as the *lex situs*.

Thirdly. No contract with regard to land, *e.g.*, in France, can be carried out if its performance be opposed to French law, and no English Court will ever attempt to compel any man to perform in France a contract which French law forbids. The most that our Courts will conceivably do is to make a man pay damages for inability to do in France something which he has promised to do there.

It matters, therefore, in practice very little whether we hold that a contract with regard to land is governed as to its incidents by the *lex situs*, or hold that such a contract is governed by its proper law; still the two different doctrines may, though in rare instances, lead to different results. That this is so may be seen from the following imaginary cases, in each of which it is for the sake of simplicity supposed that X and A are Englishmen domiciled in England, that the contract between them is made in England, and that it contains

(*e*) *Ex parte Pollard* (1840), Mont. & Ch. 239, 250; 4 Deacon, 27; *In re Smith*, [1916] 2 Ch. 206. See Rule 53, Exception, p. 225, *ante*.

(*f*) *Cood v. Cood* (1863), 33 L. J. Ch. 273, 278.

(*g*) *Paget v. Ede* (1874), L. R. 18 Eq. 118.

(*h*) If a contract is void by the *lex loci contractus*, an immovable security given for it is also void, though the original contract would be valid by the *lex situs* of the security. Westlake, s. 163, citing *Richards v. Gooch* (1827), 1 Molloy, 22.

a clause providing that it shall, as far as possible, be governed by the law of England.

Case 1.—X contracts with A to make some disposition of land in France which French law renders impossible, *e.g.*, to entail the land upon A's eldest son and his heirs.

If the contract is governed by the *lex situs* it is void, and no action can be maintained in England for the breach of it. If it is governed by the *lex loci contractus* (proper law), an action may apparently be maintained in England for breach of the contract, *i.e.*, X may, in certain circumstances, be forced to pay damages for his inability to perform his promise.

Case 2.—X contracts with A to deal with land in France in some way which French law absolutely prohibits, *e.g.*, to use the land for some purpose which cannot be carried out without exposing X to penalties under the law of France. The contract whether it is governed by the *lex situs* or by its proper law (*semble*) is void (*i*), and no action for the breach thereof can be maintained in England.

Case 3.—X contracts with A to provide A, six months after the date of the contract, with a room in a foreign country for the performance there of a concert by A. Before the date for the performance of the concert some event occurs which under the law of England (proper law) would, if the room had been in England, have excused X from the performance of his contract and freed him from liability for damages for non-performance, but which, under the law of the foreign country, does not free A from such liability. If the contract is governed by the *lex situs*, an action is maintainable in England against X for breach of contract, but if, as would appear to be the case, the contract is governed by its proper law (*lex loci contractus*), an action for breach of contract is not maintainable in England by A against X (*k*).

(D) *Application of the two doctrines to questions of capacity and formalities.*—If it is recognized that there are two distinct classes of contracts affecting land which are governed by two distinct laws, it becomes easy to answer the question of the law governing *capacity* to contract and the *formalities* requisite. When the contract is intended to have direct operation on the land in question, it is obvious that it must be governed by the *lex situs*; the parties entering into it must possess capacity under that law, and the formalities must be such as that law prescribes. On the other hand, if a contract

(i) See Rule 160, p. 588, and Exception 3, p. 597, *ante*.

(k) Compare *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589, and *Taylor v. Caldwell* (1863), 3 B. & S. 826; 32 L. J. Q. B. 164.

is entered into in England which is intended to operate as an equitable mortgage of foreign lands, and which is invalid by the *lex situs*, it would be absurd to demand that the parties should have capacity under that law, or that the formalities should be in harmony with a law, which does not in the case supposed recognize an equitable mortgage. It is clear, therefore, that such a contract must be regulated both as regards the capacity of the parties and the formalities affecting it as governed by its proper law.

NOTE 21.

THE WILLS ACT, 1861.

24 & 25 VICT. c. 114.

An Act to amend the Law with Respect to Wills of Personal Estate made by British Subjects.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

5. This Act shall extend only to wills or other testamentary instruments made by persons who die after the passing of this Act.

NOTE 22.

WHAT IS THE LAW DETERMINING THE ESSENTIAL VALIDITY OF A CONTRACT ? (1)

(A) *Nature of Inquiry*.—A contract is under the law of any country essentially valid when it is a contract of a kind to which the law will give effect; a contract lacks essential validity under the law of a given country, *e.g.*, England, when it is one to which, on account of its nature, the law will not give effect. Thus under the law of England a contract to commit a crime, a contract partaking of champerty, a wagering contract, a contract void for want of consideration, are all materially or essentially invalid. They are contracts which the law treats as void or voidable, and therefore refuses to give them effect, and this because of the nature of the contract. It should be noted, however, that a contract may be essentially invalid either because it is illegal, *i.e.*, is an agreement which the law in strictness forbids, or because it is an agreement which, though not in any sense forbidden by law, is one to which the law for one reason or another will not give effect; such an agreement (*e.g.*, under the law of England a wagering contract) is not in any strict sense illegal. All contracts which are materially invalid have this feature in common; they are all contracts which, under the law of a given country, are, on account of something in the nature of the agreement, invalid, *i.e.*, void or voidable. Now assume, as we may do, that under the law of every country some contracts are materially invalid, and that the laws of different countries differ more or less as to the contracts which they treat as invalid, and we are at once met by the following question: Whenever a contract contains any foreign element (*m*), *e.g.*, is made in England, and is to be performed in France or *vice versâ*, and is materially valid under the law of the

(1) Westlake, ss. 212, 213; Foote, pp. 358—361; Nelson, pp. 261—266; Baty, *Polarized Law*, pp. 43—48; Pillet, *Principes de Droit International Privé*, chap. xv.

(m) See Intro., pp. 1, 2, *ante*.

one country, but materially invalid under the law of the other, by the law of which country is an English Court to determine its material validity? This is, in substance, the inquiry before us.

(B) *Answer to Inquiry.*—The answer to our inquiry is supplied by three different and competing theories; they often lead to the same practical result, but they must be carefully distinguished.

First theory.—*The essential validity of a contract depends upon the law of the country where the contract is made.*

This is historically the oldest view, and has a good deal of truth. As regards the greater number of contracts made by Englishmen in England, and which are for the most part to be performed in England, it is for the most part natural to assume that such contracts must be governed by the law of England. The tendency to take this view was increased by the fact that private international law, or the conflict of laws, very little occupied English attention until after the union in 1707 between England and Scotland, and further that the contracts with which the Courts were at first mainly concerned were contracts of marriage between the inhabitants of England contracted in Scotland, or between the inhabitants of Scotland made in England. Now it is perfectly certain that it was wise to determine at any rate the formal validity of such marriages, by the law of the country where they were celebrated (*lex loci contractus*), and that, to look at the matter more broadly, a contract made in Scotland should depend for its validity and effect on the law of Scotland, and that a contract made in England should depend for its validity and effect on the law of England. This tendency was supported by the ambiguity of the term *lex loci contractus*, which, as we have seen (*n*), came to be interpreted, not merely as the law of the country where the contract was entered into, but as the law of the country where the contract was intended to be carried out. When the increasing complexity of business relations resulted in the Courts devoting more consideration to the law governing the validity of a contract, the transition was easy to one of the two following theories, according as stress was laid on the idea that the law of a contract was the law of the place of performance, or the view that the guiding principle was the intention of the parties.

Second theory.—*The essential validity of a contract is to be tested in the main by the law of the place of performance (lex loci solutionis), though it may occasionally depend also upon the law of the place where the contract is made (lex loci celebrationis); in any case it does not depend upon the intention of the parties.*

(*n*) See Note 5, pp. 788, 789, *ante*.

This is the position maintained with great ability by Mr. Foote, who sums up his doctrine in these words:—

“The legality,” he writes, “of a contract depends generally upon the law of the place of intended performance.

“An act which is illegal by the law of the place where it is intended to be done cannot be validly contracted for in any place.

“But the legality of the making of the agreement, *i.e.*, the giving “a particular consideration for a particular promise—seems to depend “upon the *lex loci actus*” (o).

The point to be noted is that Mr. Foote’s theory makes the legality of a contract wholly independent of the intention of the parties, and therefore independent of the “proper law of the contract,” which is nothing else than the law by which the parties intend that their contract shall be governed. “Wide,” he writes, “as the operation “necessarily is which is given to the *intention* of the parties to a “contract, it is plain that it can have no effect upon the question of “the legality or illegality of the thing contracted for. No law can “permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign “law. Thus, if the thing contracted to be done is illegal by the law “of the place of the intended performance, the contract should be held “void, wherever it was actually entered into, by all Courts “alike” (p).

This doctrine has great plausibility, and within certain limits is sound.

Parties who contract under a given law cannot at their will make a contract legal and valid, which that law declares to be illegal and invalid. It is also plain that in many cases a contract which is unlawful by the law of the place where it is to be performed should be held unlawful elsewhere, to which it may further be added that, as the law of the place of performance is often the proper law of a contract, Mr. Foote’s conclusions in practice constantly coincide with the views of those who conceive that the essential validity of a contract depends to a great extent upon its proper law. But though there seems at first sight good ground for acquiescing in the theory that the validity of a contract is governed by the *lex loci solutionis*, this theory must be, at any rate in the eyes of a writer who is bound by English decisions, open to more than one objection.

(o) Foote (4th ed.), p. 568.

(p) Foote, pp. 358, 359. He also shows, though this is a point with which we need not for our present purpose greatly concern ourselves, that an agreement, the making of which is positively prohibited by the law of the country where it is made, should, and probably will, be held void in other countries. Foote, pp. 362, 363. See p. 595, *ante*.

First objection.—The interpretation of a contract and the obligations undertaken by the parties, or, at any rate, intended to be undertaken by them, must, as Mr. Foote admits, be governed by the law to which they intended to submit themselves. But it is extremely difficult on the one hand to separate from one another questions as to the validity and questions as to the effect of the terms of a contract, and it is impossible, on the other hand, to maintain that the proper law of a contract is always fixed by the law of the place of performance. When, for example, it is fixed, as in agreements for carriage by sea, by the law of the flag, it cannot be maintained that the proper law of the contract is the *lex loci solutionis*.

Second objection.—The theory is, it is submitted, inconsistent with authoritative decisions of English Courts (*q*).

Third objection.—If, however, the decisions referred to can (as is possibly the case) be so explained as to be consistent with the decisive influence attributed to the *lex loci solutionis*, the theory that the law of the place of performance in itself governs the validity of a contract is, nevertheless, opposed to the whole course of thought pursued by English judges when determining the question which is now under consideration. They first try to decide what is the country by the law of which a contract is substantially governed, and ask themselves whether a given agreement is an "English contract" or a foreign, *e.g.*, a "French contract." In determining this point they take into account both the terms of the contract itself and all the circumstances of the transaction, such as the character of the parties, the place where the contract is made, the place where it is to be performed, and so forth. When, from this general survey of the facts, they have made up their minds as to the country to which the contract belongs, they then hold that not only the effect, but also the validity, of the contract is governed by the law of such country; if the contract is an English contract they determine its validity, no less than its interpretation, by reference to English law; if the contract is a French contract they determine both these points by reference to French law. That this is the train of thought in the main followed by our judges is apparent from a study of such cases as *Jacobs v. Crédit Lyonnais* (*r*); *In re Missouri Steamship Co.* (*s*); *P. & O.*

(*q*) *Lloyd v. Guibert* (1865), L. R. 1 Q. B. 115; *P. & O. Co. v. Shand* (1865), 3 Moore, P. C. N. S. 272; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589; *In re Missouri Steamship Co.* (1889), 42 Ch. D. (C. A.) 321; *Hamlyn v. Talisker Distillery*, [1894] A. C. 202; *Spurrier v. La Cloche*, [1902] A. C. 446. See, however, for the explanation of *Jacobs v. Crédit Lyonnais*, p. 598, note (*q*), *ante*.

(*r*) (1884), 12 Q. B. D. (C. A.) 589.

(*s*) (1889), 42 Ch. D. (C. A.) 321.

Co. v. Shand (t); *Hamlyn & Co. v. Talisker Distillery* (u); *Trinidad Shipping Co. v. Alston* (x); and *Spurrier v. La Cloche* (y). But if this be so, two results follow. The first is, that English Courts do not draw a broad distinction between the law governing the interpretation or effect and the law governing the legality or validity of a contract. The second is, that as the law which governs the interpretation of a contract is the "proper law of the contract" (z), or, in other words, the law or laws intended by the parties to apply to it, we are driven to the conclusion that, in general, and at any rate indirectly, the validity of a contract is governed by the proper law thereof.

This leads to the

Third theory.—*The essential validity of a contract is (subject to certain wide exceptions) governed indirectly by the proper law of the contract* (a).

This theory is consistent not only with the language of English judges, but, what is of more consequence, with their mode of thought. They hold that a contract is governed by the law of the country with which it has most substantial connection, or, to put the matter shortly, to which it belongs, *i.e.*, that an English contract is governed by English law, an American contract by American law, and so forth. But, when we ask what is the circumstance which in the main determines what is the country to which a contract belongs, we find that it is the intention of the parties, or, in other words, we are brought round again to the conclusion that the essential validity of a contract is in the main determined by the proper law thereof. We can now see what is the real meaning of English judges when they decline, as they often most rightly do, to be bound by any hard and fast rule as to the law governing the construction or validity of a contract. They do not intend to question the principle that a contract is governed by the law or laws to which the parties intended to submit themselves, but do intend to express the perfectly sound doctrine that, in ascertaining what this intended law is, a Court ought to take into account every circumstance of the case, and ought not to be tied down to any rigid presumption that the parties must have intended to be bound by a particular law, whether it be the *lex loci celebrationis*, or the *lex loci solutionis*.

(t) (1865), 3 Moore, P. C. N. S. 272.

(u) [1894] A. C. 202.

(x) [1920] A. C. 888.

(y) [1902] A. C. 446.

(z) See p. 572, *ante*.

(a) See Rule 160, p. 588, *ante*, and compare especially Westlake (5th ed.), s. 212, and Nelson, p. 266. Westlake comes nearly, but not quite, to the conclusion here expressed.

The theory, again, that the material validity of a contract is governed by its proper law explains (if the exceptions thereto be taken into account) how it happens that the validity of a contract is constantly governed by the *lex loci solutionis*. The reason is none other than that the *lex loci solutionis* is more often than not the proper law of a contract.

In order, however, to do justice to the third theory, we must bear in mind its limitations, or, in other words, the extent of the real or apparent exceptions to the rule that the validity of a contract depends on its proper law (*b*).

These exceptions all flow from two obvious principles.

The first principle is that an English Court will not enforce any contract which is opposed to the law of England, or to the morality supported by the law of England (*c*).

The second principle is that a contract will be held in general invalid in England which involves the doing *in any civilized country* of an act which is forbidden by the law of that country. This applies whether the unlawful act be the *making* of a contract or the *performance* of a contract (*d*).

Our theory, moreover, is not, when rightly understood, really inconsistent with the views of the best writers.

Story holds that the nature, the obligation, and the interpretation of a contract are all governed by the same law (*e*), and this law, though at first sight one might suppose it from his language to be the law of the place where the contract is made, clearly is with him the law which the parties intended to adopt (*f*).

Mr. Foote, no doubt following in this, it must be admitted, the language of Story, holds, as already pointed out, that the *lex loci solutionis* must be decisive. But all that is true in this theory is met by the consideration that the *lex loci solutionis* is more often than not the proper law of a contract, and that in general a contract is invalid under its proper law, if it cannot lawfully be performed at the place of performance.

Westlake's opinion comes very near to the admission that the proper law of a contract is the law governing its validity.

(*b*) See Exceptions 1—3 (pp. 593—597) to Rule 160, *ante*.

(*c*) For examples, see *Robinson v. Bland* (1876), 2 Burr. 1077; *Grell v. Levy* (1864), 16 C. B. N. S. 73; *Biggs v. Lawrence* (1789), 3 T. R. 454; *Clugas v. Penatuna* (1791), 4 T. R. 466; *Pearce v. Brooks* (1866), L. R. 1 Ex. 213, and General Principle No. II. (A), (B), p. 34, *ante*.

(*d*) See General Principle No. II. (C), p. 34, *ante*. When English law is the proper law of a contract there is no real exception to the rule that the validity of a contract rests on its proper law, in cases falling under Exception 3 to Rule 160.

(*e*) Story, s. 263.

(*f*) Compare ss. 263 and 280.

"It may," he writes, "probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such" (g).

But Westlake himself lays down that "a contract which is illegal by its proper law cannot be enforced" (h), and in commenting on *Jacobs v. Crédit Lyonnais* (i), and *Re Missouri Steamship Co.* (k), writes: "It must be admitted that in both cases a stress was laid by the learned judges on the intention of the parties, as the governing element in the choice of a law, which is not in accordance with the discussion preceding the § [i.e., § 212], and which, where the lawfulness of the intention is itself in question, as it was in *Re Missouri Steamship Co.*, I still find it difficult to reconcile with the logical order to be followed" (l). Westlake, in short, apparently holds that the law generally governing a contract determines its essential validity, but does not think that its validity can in any way depend on the intention of the parties.

The truth is, that the doctrine laid down in Rule 160 (m), and here advocated, is clearly open to one grave objection (n).

The proper law of a contract, it may be objected, is the law chosen by the parties and intended by them to govern the contract. If, then, it may be argued, the proper law of a contract determines its essential validity, the legality of an agreement depends upon the will or choice of the parties thereto; but this conclusion is absurd, for the very meaning of an agreement or promise being invalid is that it is an agreement or promise which, whatever the intention of the parties, the law will not enforce; the statement, for example, that under the law of England a promise made without a consideration is void, means neither more nor less than that the law will not enforce such a promise even though the parties intend to be legally bound by it, and this state of things cannot be altered by the fact that Englishmen contracting in England intend, and even in so many words express their intention, that a promise made by one of them, X, to the other A, shall, though made without a consideration, be governed by the law of a foreign country, and therefore be valid. The same objection is sometimes put in another shape. X and A enter in England into

(g) Westlake, s. 212, p. 305, followed by Baty, *Polarized Law*, pp. 47, 48.

(h) Westlake, s. 213.

(i) 12 Q. B. D. 589.

(k) 42 Ch. D. 321.

(l) Westlake, p. 306.

(m) See p. 588, *ante*.

(n) See also Pillet, chap. xv.

a contract to be performed partly in England and partly in another country, *e.g.*, the Mauritius. The whole of it, or one of its terms, is valid by the law of England, but invalid by the law of the Mauritius. Is the contract or the term in question to be held valid or not? If you look to the intention of the parties, it is in the absence of fraud an almost certain presumption that they meant to contract with reference to the law which makes the contract valid. Hence, however, the result would follow that where there is a question between two possible laws under one of which a contract is, and under the other of which a contract is not valid, the contract must always be held valid (o). But this result is absurd. Whatever form, in short, the objection takes, it amounts to this, that the essential validity of a contract cannot depend upon the choice of the parties thereto, but that to make the validity of a contract depend upon its proper law is to make its essential validity depend on the choice of the parties.

The reply to this objection is that its force depends on a misunderstanding of the principle contended for. No one can maintain that persons who really contract under one law can by any device whatever render valid an agreement which that law treats as void or voidable. What is contended for is that the *bonâ fide* intention of the parties is the main element in determining what is the law under which they contract. To put the same assertion in another form, an English contract is governed by English law, a French contract is governed by French law; but when, say, an Englishman and a Frenchman, or two Englishmen, enter in England into a contract to be wholly or partly performed in France, their *bonâ fide* intention is, at any rate, the chief element in determining whether the contract is an English contract or a French contract (p). No doubt, in deciding this matter, the Court must regard the whole circumstances of the case. As regards the interpretation of the contract, the expressed intention is decisive; as regards its essential validity or legality, this is not quite so certainly the case. If it is clear they meant to contract under one law, *e.g.*, the law of England, no declaration of intention to contract under another law so as to give validity to the contract will avail them anything (q). But this result follows because in the view of the Court their real intention was to enter into an English contract.

If this one solid objection to our theory be removed, the doctrine that, according, at any rate, to the view of English judges, the

(o) Compare *P. & O. v. Shand* (1865), 3 Moore, P. C. N. S. 272.

(p) Compare *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. (C. A.) 589.

(q) Nor will the Court presume such intention in order to safeguard the validity of a contract. *Royal Exchange Assurance Corporation v. Sjöforsakrings Aktiebolaget Vega*, [1902] 2 K. B. (C. A.) 384.

essential validity of a contract is determined by its proper law is, it is submitted, made out. It will be noted that in Rule 160 (*r*), the statement is made that the essential validity of a contract is governed "indirectly" by its proper law. The word "indirectly" is inserted for the very purpose of showing that the parties cannot directly determine by their choice whether a contract shall be legal or not. What they can do is to determine what is the law under which they in fact contract, and the rules of this law, *i.e.*, the proper law will, subject, however, to wide exceptions, determine whether a contract is essentially valid or invalid.

NOTE 23.

THE CASE OF *OGDEN v. OGDEN* (*s*).

(1) The actual and direct effect of the judgment of the Court of Appeal in *Ogden v. Ogden* may be summed up in one sentence: "The Court approves of and follows *Simonin v. Mallac*" (*t*). In truth *Ogden v. Ogden* decides nothing whatever which was not determined by *Simonin v. Mallac*, and which has not been treated as good law for some forty-seven years. The whole importance of *Ogden v. Ogden* lies in the language used by the Court of Appeal in delivering judgment.

(2) The language, though not the decision of the Court, does not overrule (*u*), but lessens the authority of the doctrine laid down by the Court of Appeal in *Sottomayor v. De Barros*, that "as in other contracts, so in that of marriage, personal capacity must depend "on the law of the domicile" (*x*). The Court of Appeal as then constituted, clearly leant towards the theory that personal capacity, as in other contracts, so in that of marriage, depends, at any rate when the marriage is celebrated in England, on the *lex loci contractus*. The Court thus suggests doubt as to the validity of a principle which has been accepted as law for over thirty years, and which lies at the bottom of the decision given in several most important

(*r*) See p. 588, *ante*.

(*s*) [1907] P. 107; [1908] P. (C. A.) 46.

(*t*) (1860), 2 Sw. & Tr. 67.

(*u*) The Court of Appeal holds itself precluded from overruling a previous considered decision of that Court or of Courts of like authority, *viz.*: the Exchequer Chamber and the Court of Appeal in Chancery. See *Pledge v. Carr*, [1895] 1 Ch. (C. A.) 51, 52; *Levy v. London County Council*, [1895] 2 Q. B. 577, 581, *per* Lindley, L. J. Cf. p. 786, *ante*.

(*x*) (1877), 3 P. D. 1, 5.

cases more or less closely connected with the law governing capacity to marry (*y*).

(3) Though the language as to contractual capacity used by the Court which decided *Sottomayor v. De Barros* was probably rather too wide, it may be regretted that the Court which decided *Ogden v. Ogden* did not consider the question whether there may not exist a wide difference between the law which determines the capacity of a person to enter into an ordinary mercantile contract and the law which determines the capacity of a person to enter into the contract of marriage or any contract closely connected with marriage. Reasons suggest themselves why capacity in the one case may be rightly determined by the law of the country where the contract is made (*lex loci contractus*), whilst capacity in the other case may be rightly determined by the law of the country where a party to the marriage contract is domiciled.

(4) In *Ogden v. Ogden* the question of divorce jurisdiction did not in strictness call for decision. The Court of Appeal, however, for the benefit of any woman placed, as was the appellant, in the awkward position of being held in England married to a French citizen, whilst her marriage with him was declared a nullity by French Courts, threw out the suggestion that in such circumstances the wife might probably be treated by the English Divorce Court as having a domicile in England sufficient to support proceedings for the dissolution of her marriage. The suggestion is not in itself unreasonable, but it has had the bad effect of introducing a new, and, as things now stand, a hypothetical and very uncertain exception to the established rule that divorce jurisdiction is and ought to be based upon domicile (*z*). With Courts, as with Parliaments, hard cases are apt to produce dubious if not bad law (*a*). At present the one certain but far from satisfactory conclusion is that the modern Continental doctrine of preferring nationality to domicile, so logical and simple on the face of it as to have captured most of the legislatures and jurists of Europe, has really led to far more confusion than it prevents.

(*y*) See *Brook v. Brook* (1861), 9 H. L. C. 193; *Re Cooke's Trusts* (1887), 56 L. J. Ch. 637; *Cooper v. Cooper* (1888), 13 App. Cas. 88; *Viditz v. O'Hagan*, [1900] 2 Ch. (C. A.) 87; *In re Bozzelli's Settlement*, [1902] 1 Ch. 751.

(*z*) *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.

(*a*) See Note 14, p. 828, *ante*; *Stathatos v. Stathatos*, [1913] P. 46; *De Montaigu v. De Montaigu*, [1913] P. 154.

NOTE 24.

THE EWING v. ORR EWING CASE (b).

D has died domiciled in Scotland, possessed of movable and immovable property there, and of only a small amount of personal property in England. He has appointed six persons executors and trustees under his will. Of these some reside in Scotland, some in England. They obtain confirmation of the will in Scotland, and the confirmation is sealed in England under 21 & 22 Vict. c. 56 (c). *A*, an infant legatee, resident in England, brings an action by his next friend for administration of the estate. The writ is served upon the trustees in England, and under an order upon the trustees in Scotland. The trustees appear without protest. It is held that the Court has jurisdiction to administer the trusts of the will as to the whole of the estate, whether in England or in Scotland, and that, as no proceedings are pending in a Scottish Court by which the interest of the infant could have been equally protected, the exercise of the jurisdiction is a matter not of discretion, but of justice.

This statement contains the essential circumstances, and gives the whole direct effect, of the English case of *Ewing v. Orr Ewing* (d). The decision of the House of Lords refers in strictness rather to proceedings against trustees than to proceedings against personal representatives. From this point of view the case does little more than carry out the principle involved in *Penn v. Baltimore* (e), and all it appears absolutely to decide is that, where the executors of a person dying domiciled in a foreign country are also trustees under his will, the Court has jurisdiction to entertain an action for the execution of the whole of the trusts under the will against the trustees who are in England and the trustees who can be served with a writ in a foreign country (f).

But though this is all which is necessarily decided in the English case of *Ewing v. Orr Ewing*, the following points with regard to the administration of a deceased person's property are raised and more or less authoritatively determined in the two *Orr Ewing Cases*.

(b) (1883), 9 App. Cas. 34. And see *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453 (Scottish); Westlake, s. 103; 2 Williams, Executors (11th ed.), pp. 1281—1285.

(c) See Rule 134, p. 495, *ante*.

(d) Compare *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453.

(e) (1750), 1 Ves. Sen. 444. See Rule 53, Exception, p. 225, *ante*.

(f) Compare, for this view of the case, *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34, 46, judgment of Lord Blackburn, and p. 48, judgment of Lord Watson, with *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453, 522, 523, judgment of Lord Blackburn.

(1) Lord Westbury's doctrine (*g*) that the Courts of the country in which a deceased person is domiciled at the time of his death have *exclusive* jurisdiction to administer his movable property is negatived.

(2) Under an ordinary grant of administration the High Court has, on being applied to, jurisdiction to administer the whole of the movable property of the deceased, whatever its local situation, and whether he has died domiciled in England or in a foreign country (*h*).

(3) The Courts of a foreign country, *e.g.*, Scotland, have a right, if they see fit, to deal with and administer property of the deceased locally situate in that country (*i*).

(4) A personal representative under an English grant, which is not limited, is liable to account for assets out of England (*k*), but his liability in regard to foreign assets would seem to depend upon his relation to them, *i.e.*, upon his legal power to get possession of and deal with such assets (*l*).

The result of the conclusions which may be deduced from or are suggested by the *Orr Ewing Cases* is that conflicts may undoubtedly arise between English Courts and the Courts of a foreign country as to the administration of a deceased person's movable property, and that "whenever a real conflict of jurisdiction does arise between two independent tribunals, the better course for each to pursue is to exercise its own jurisdiction so far as it availably can, and not to issue judgments proclaiming the incompetency of its rival" (*m*). These words of Lord Watson's are a valuable recognition, be it noted, of the principle of effectiveness, or, in other words, of the principle maintained throughout this treatise, that a Court's jurisdiction ought to be limited by its power to enforce its judgments (*n*).

NOTE 25.

QUESTIONS WHERE DECEASED LEAVES PROPERTY IN DIFFERENT COUNTRIES (*o*).

A testator or intestate may, at his decease, leave property of different kinds in different countries, *e.g.*, movables in England and immovables in Scotland. And "where land and personal property are

(*g*) *Enohin v. Wylie* (1862), 10 H. L. C. 1, 13, 15, 16.

(*h*) *Ewing v. Orr Ewing* (1883), 9 App. Cas. 34, 39, judgment of Selborne, C.

(*i*) *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453. See Rule 101, p. 427, *ante*. Compare Maclaren, Court of Session Practice, pp. 65, 66.

(*k*) See Rule 85, p. 374, *ante*.

(*l*) Compare 2 Williams, Executors (11th ed.), pp. 1281—1285.

(*m*) *Ewing v. Orr Ewing* (1885), 10 App. Cas. 453, 532, judgment of Lord Watson.

(*n*) See Intro., General Principle No. III., p. 40, *ante*.

(*o*) Westlake (5th ed.), ss. 117—125; Foote (4th ed.), pp. 200—204, 208—210, 213—216; Nelson, pp. 198, 199.

“situated in different countries, governed by different laws, and a question arises upon the combined effect of those laws, it is often very difficult to determine what portion of each law is to enter into the decision of the question [of the distribution of, or claims upon, the property]. It is not easy to say how much is to be considered as depending on the law of real property [immovables]; which must be taken from the country where the land lies [*lex situs*]; and how much upon the law of personal property [movables], which must be taken from the country of the domicile; and to blend both together; so as to form a rule, applicable to the mixed question, which neither law separately furnishes sufficient materials to decide” (*p*). These words refer to the question how far the heir of heritable property in Scotland which an English will has been inoperative to pass, being a legatee of personal property in England, is put to his election. But they apply in principle to all the various questions which may arise when a deceased person leaves property of one description, *e.g.*, movables, in England, and property of another description, *e.g.*, immovables, in a foreign country. The general rule, no doubt, is that immovables or land, or rights, or obligations connected with land which are treated by the *lex situs* as immovables, are governed by the *lex situs*, and that movables or things treated by the law of the country where the things are situate as movables (*q*) are governed by the law of the deceased’s domicile (*lex domicilii*). But these two general principles do not lead us far towards answering the different inquiries now calling for consideration. In this Note it will be convenient to confine our attention primarily to cases in which a testator or intestate leaves property of different kinds in England and in Scotland respectively.

The questions which, under these circumstances, may arise, or, at any rate, have arisen, refer in the main to three points:—

- (A) The *devolution* of the whole estate.
- (B) The heir’s right of *recourse* against the movables or personality.
- (C) The heir’s *election* between taking under or against a will which, as to immovable property, is invalid.

(A) *Devolution*.—The rule as to this is simple. Every question as to the devolution of *immovables* (land) either under a will or in case of intestacy is to be determined by the law of the country where the immovables are situate (*r*) (*lex situs*). The *lex situs*, for example,

(*p*) *Brodie v. Barry* (1813), 2 Ves. & B. 127, 131, judgment of Grant, M. R.

(*q*) See Rule 149, p. 539, *ante*.

(*r*) See Rule 150, p. 542, *ante*, and compare Rule 149, and comment thereon, pp. 539—541, *ante*.

determines whether an instrument, *e.g.*, a Scottish heritable bond (*s*), conferring a right relating to an immovable, is itself an immovable; who is the person to whom the immovable descends; and whether a given will is valid as regards immovables (*t*). Every question, on the other hand, as to the devolution of movables, such as who is the person entitled to succeed to them beneficially; how they are to be distributed; whether a given will is valid as regards movables; must be determined in general by the *lex domicilii* of the deceased intestate or testator. It must, however, be here as elsewhere borne in mind that "personal property," if the term be accurately used, includes, but is not equivalent to, movable property (*u*), and that, though the beneficial succession (*x*) to movable property is under English law governed by the *lex domicilii* of the deceased, yet the administration (*y*) thereof, *e.g.*, as regards the payment of debts, is under English law governed by the *lex fori*, which in this case is equivalent to the *lex situs*, *i.e.*, the law of the country (England) where the movable property or personalty is situate and administered.

(B) *Recourse*.—The heir or devisee of immovables in Scotland may have paid in Scotland debts due from the deceased. Can he have recourse against the personal estate in England for repayment? Of course, if the point is dealt with in the will of the deceased, then the rights and liabilities of the heir are governed by the will. If, for example, a testator who leaves personalty in England and real estate in Scotland directs that all his debts shall be paid out of his personal estate, then the right of the heir to look to the personalty in England for repayment of debts of the testator paid by the heir in Scotland is clear. If, however, the matter is not dealt with by the will, then "the right of the heir of foreign immovables . . . to have recourse "against the personal estate in England for the amount of debts of "the deceased which he has paid, is determined by the *lex situs* of "the immovables" (*z*). These are the words of Mr. Westlake; they give, therefore, as might be safely assumed, an answer to our inquiry which is, as far as it goes, correct.

A person has died domiciled in a foreign country. A, his heir, is compelled to pay debts due there out of land coming to him in such

(*s*) *Brodie v. Barry* (1813), 2 V. & B. 127; *Johnstone v. Baker* (1817), 4 Madd. 474, n.; *Jerningham v. Herbert* (1829), 4 Russ. 388. Heritable bonds are now, under the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), s. 117, movables as regards the succession of the creditor in Scotland, save *quoad fiscum*, and rights of courtesy and terce.

(*t*) *Brodie v. Barry* (1813), 2 V. & B. 127; *Dundas v. Dundas* (1830), 2 Dow & Cl. 349.

(*u*) See pp. 75—77, 336, *ante*.

(*x*) See p. 338, *ante*.

(*y*) See Rule 191, p. 709, *ante*.

(*z*) Westlake, s. 118.

country as heir. But *A* has, under the law of such foreign country, a right to be repaid the amount of the debts out of the deceased's movables. *A* has, therefore, a right of recourse against the English personalty left by the deceased (*a*).

The deceased, again, dies domiciled in England; he leaves real estate in Scotland and personalty in England. *A*, his heir, pays ordinary debts of the deceased out of real estate in Scotland. Under Scottish law, he has a right to repayment out of the movable property of the deceased. He has, therefore, a right of recourse against the English personalty (*b*).

The heir of Scottish land pays, in 1820, sums due on heritable bonds given by the deceased. Such bonds are under Scottish law a charge upon the real estate, in other words, are payable by the heir. He has no right, therefore, to be repaid out of the English personal estate the sums paid in respect of the bonds (*c*).

These cases illustrate and fall within Mr. Westlake's dictum, but they show, it is submitted, that that dictum, though true, is incomplete. The right of the heir of foreign, *e.g.*, Scottish, lands to have recourse against the personal property of the deceased in England is, no doubt, in one sense, governed by Scottish law (*lex situs*), for, in order to have a claim against the personal estate in England, he must show that under Scottish law he has a right to repayment, but his right is in reality governed only indirectly by the *lex situs*, and primarily by the law of England (*lex fori*), *i.e.*, the law of the country where English personalty is being administered. It is English law which determines that in an administration in England English personalty is primarily liable for all the debts, English or foreign, of the deceased, and that irrespective of his domicile (*d*). It is Scottish law which determines whether there is a debt due to the heir at all from the deceased's estate.

Whether again the heir or devisee of English lands who is compelled to pay debts due from the deceased can have recourse for payment against the movables of a deceased in a foreign country must depend primarily upon the law of the country, *e.g.*, Victoria, where the deceased's movable property is being administered, and only indirectly on English law. Under English law *A*, the heir, has a claim against the personal estate out of which the debts are primarily

(*a*) *Anon.* (1723), 9 Mod. 66.

(*b*) *Winchelsea v. Garety* (1838), 2 Keen, 293.

(*c*) *Elliott v. Minto* (1821), 6 Madd. 16; *Drummond v. Drummond* (1799), 6 Bro. P. C. 601; in the latter case the testator's domicile was English, in the former it is not stated.

(*d*) See Rule 191, p. 709, *ante*; *In re Smith*, [1913] 2 Ch. 216.

payable (e), but it is entirely a matter for the law of Victoria to decide whether that claim can be enforced there.

(C) *Election*.—"Election, in the sense here used, is the obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person, from whom he derives one, that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both" (f).

"If a testator," says Lord Eldon (g), "gives his estate to A, and gives A's estate to B, Courts of Equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to effectuate the implied condition contained in the will of the testator."

These descriptions of the doctrine of election are sufficient to indicate its origin and scope. But with the development of the doctrines of equity the question of the actual intention of the testator has been relegated to the background (h), and the matter is now regulated by technical rules, not all of which can logically be explained on the theory underlying the principle. For our purpose it is sufficient here to note that a singular tenderness has been shown by the Courts for the English heir; thus if a testator devises English freehold land to A, and bequeaths movable property to B, his heir, and if the devise turns out to be invalid, whether for want of capacity (i), or defect of form (k), or material invalidity (e.g., contravention of the rule against perpetuities) (l), then it has been held that

(e) See 2 Williams, Executors (11th ed.), pp. 1304, 1305. The view there (p. 1305, n. (y)) suggested, that the right of recourse rests on the law of the testator's or intestate's domicile (compare Story, s. 528), is in accord with all the decided cases in England so far as the domicile of the testator or intestate appears from the reports, for in no case does it seem that the law of the domicile did not allow recourse when the *lex situs* admitted the existence of a debt. But it is not in accord with the rule laid down in *In re Kloebe* (1884), 28 Ch. D. 175, which requires an English administrator to pay all debts, foreign or otherwise, from the funds in his hands, and which therefore would render it necessary for him to admit as a valid claim a demand for repayment by a devisee of land in Scotland, who received the land under the will of a testator domiciled in some country where no right of recourse existed. It is probably due to this doctrine, which Westlake (s. 110) strongly holds, that he was led to accord the decisive weight to the *lex situs*, whereas the governing law is clearly the *lex fori*, the *lex situs* merely determining the existence of a debt.

(f) Story, Equity Jurisprudence (3rd English ed.), s. 1075, p. 450.

(g) *Ker v. Wauchope* (1819), 1 Bli. 1, 22.

(h) *Cooper v. Cooper* (1874), L. R. 7 H. L. 53, 67, per Lord Cairns.

(i) *Dearle v. Greenbank* (1749), 1 Ves. Sen. 298.

(k) *In re De Virte*, [1915] 1 Ch. 920; *Dewar v. Maitland* (1866), L. R. 2 Eq. 834, 839.

(l) *In re Oliver's Settlement*, [1905] 1 Ch. 191; *In re Bankes' Settlement*, [1905] 1 Ch. 256; *In re Nash*, [1910] 1 Ch. (C. A.) 1.

B is entitled to take the land against the will, and to take the bequest under the will, though, if intention were any criterion, it would seem as if the testator meant precisely the reverse.

The rule applicable in the case of English heirs has not been applied to heirs of foreign immovable property. The explanation of this discrimination in treatment is simple; for a Court of Equity to insist on the doctrine of election in a case where the will was invalid as regards English land, would have been an indirect effort to overthrow the system of law regulating that land, and would have involved a serious struggle with the Courts of Common Law on a ground unfavourable to doctrines of equity. In the case of foreign immovables no such struggle could arise. The English Court had before it simply the question how it was equitable to deal with a claim to movable property in England put forward by an heir to foreign land who had taken that land against the terms of the will which bequeathed movable property to him; it could not, of course, affect directly the *lex situs*, but it owed that law no such respect as would induce it to refuse to apply the doctrine of election, lest thus indirectly it defeated the purposes of the *lex situs*. Logically the action of the English Courts in the case of the foreign heir was obviously sounder than their attitude towards the English heir, but the distinction between the two cases had become firmly established by 1813 (*m*).

The question of election by a foreign heir, as a matter of English law, can, it is clear, arise only when the distribution, as distinguished from the administration of a testator's property, falls to be determined by the English Court, *i.e.*, (1) when *T*, the testator, leaves immovable property in England, the distribution of which depends on the *lex situs* (*n*); (2) when the testator dies domiciled in England, leaving movables either in England or elsewhere, whose distribution depends on the *lex domicilii* (*o*). If *T* dies domiciled out of England and leaves no immovables in England, the distribution of his property depends on the law of his foreign domicile. Thus, if *T* dies in England leaving goods there, and land in Scotland, which would not pass under his will, either because of formal or material invalidity, and *T* were domiciled in France, the question whether election arose would be purely a matter for French law, and if—as would hardly ever be the case—the English Courts decided the issue, the law they would apply would be French law.

(*m*) *Brodie v. Barry* (1813), 2 V. & B. 127, 129, 133; *In re Ogilvie*, [1918] 1 Ch. 492.

(*n*) Compare *Dundas v. Dundas* (1830), 2 Dow & Cl. 349, which is a Scottish case, and the English cases, *Dewar v. Maitland* (1866), L. R. 2 Eq. 834; *Orrell v. Orrell* (1871), L. R. 6 Ch. 302.

(*o*) *Anon.* (1723), 9 Mod. 66; *Brodie v. Barry* (1813), 2 V. & B. 127; *Trotter v. Trotter* (1828), 4 Bli. 502; *Allen v. Anderson* (1846), 5 Hare, 163; *Harrison v. Harrison* (1873), L. R. 8 Ch. 342.

Bearing in mind these considerations, we may lay down the following rule:—

If a testator devises foreign immovable property (foreign land) under a will which on any ground is inoperative to pass the same to the devisee, and also either

- (1) *devises English immovable property (English land) to the heir of the foreign immovable property, or,*
- (2) *being domiciled in England, bequeaths movable property wherever situate to the heir of the foreign immovable property,*

the Court will not allow such heir to take any benefit under the will as regards (1) the English immovable property, or (2) the movable property, unless he fulfils the conditions of the will with respect to the foreign immovable property or compensates for his failure to do so; i.e., the heir is put to his election.

The only point of the rule which needs further explanation is the reference to compensation. On the strict application of the theory of election it might be argued that if *T* devises foreign land worth 10,000*l.* to *A*, and bequeaths to *E*, the heir to the foreign land, a legacy of 20,000*l.*, *E* must choose between taking the legacy under the will, and surrendering the land which, by reason of the invalidity under the *lex situs* of *T*'s devise, does not pass under the will to *A*, or keeping the land and giving up all claim to the legacy. The Courts, however, hold that in such a case, if *E* determines to keep the land, he can do so, but as compensation to *A*, they sequester from out of the legacy to *E* the value of the land (*p*).

If, for the sake of clearness, we assume that a deceased person has left immovable property in Scotland, and has died domiciled in England leaving there only movable property, the conditions under which the rule as to election applies may be thus stated:—

First.—*T*, the deceased, must die testate; the rule cannot apply to a case of total intestacy.

Secondly.—*T* must leave a will intended to deal both with the English movable property or personalty and with the Scottish immovable property. If the will, in the opinion of the English Courts, is not intended to apply to the Scottish immovable property or land, then no question of election arises (*q*); the Scottish heir takes any legacy under the will, and succeeds apart from it to the Scottish land as heir. The question, whether *T* intended to deal with the Scottish land by his will, falls to be decided by the law of England as the law of his domicile, and under English law merely general

(*p*) *Gretton v. Haward* (1819), 1 Sw. 409; *In re Ogilvie*, [1918] 1 Ch. 492.

(*q*) *Allen v. Anderson* (1846), 5 Hare, 163; *Trotter v. Trotter* (1828), 4 Bli. 502.

terms, such as "all my real and personal estate wherever situate," are held insufficient to show an intention on the part of the testator to deal with property incapable of passing under the will (*r*). As prior to 1868 an English will in the ordinary form was wholly incapable of passing Scottish land, it followed that general terms in an English will were necessarily construed as not intended to have any relation to Scottish land—whatever the real intention of the testator, so that the Scottish heir could not be put to his election. This cause of evasion of election has now disappeared, since under an Act of 1868 (31 & 32 Vict. c. 101), s. 20, Scottish land has been placed as regards testamentary disposition in the same position as movable property.

Thirdly.—The will must be invalid as to the Scottish immovable property; whether it is invalid or not is to be determined by Scottish law (*lex situs*).

If these conditions are fulfilled the heir is put to his election. If he takes under the will the English personalty given by the will, he must not take the Scottish land by descent. If he takes, against the will, the Scottish land by descent, then he must compensate the person, to whom the land was devised, out of the English personalty, being entitled to receive only the excess value (if any) of the personalty over the land.

The operation of this rule can best be seen from the following illustrative cases, of which the first four are decisions of English Courts, while the last is a decision of the House of Lords as the final Scottish Court of Appeal. The justification for adducing this illustration is the fact that there is unquestionably a close similarity between the English doctrine of election and the Scottish of "approve or reprobate" (*s*), but it cannot be asserted, of course, that the doctrines in the two countries have been, or can be, worked out on precisely parallel lines.

1. *T* (the testator), domiciled in England, dies possessed of immovable (hereditary) property in Scotland, and movable property (personalty) in England, Scotland, and elsewhere. *T*, by his will, devises the Scottish immovables and bequeaths the movable property to trustees in trust to divide the whole equally amongst his nephews. The will is, under Scottish law, invalid as to the Scottish immovable property. *A*, one of the nephews, is under Scottish law heir to the Scottish immovable property. *A* is put to his election either to take the Scottish immovable property against the will as heir and give up his claim as legatee in so far as the legacy does not exceed the

(*r*) *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705.

(*s*) *Brown v. Gregson*, [1920] A. C. 860, judgment of Lord Finlay, p. 870.

value of the Scottish property, or, if he takes the legacy in full, to let the Scottish immovable property go according to the will (*t*).

2. *T*, domiciled in England, dies possessed of movable property and also of immovable property in Scotland. He devises his immovable property in Scotland to *B*, and also bequeaths equal shares in his movable property to *A* and *B*. The will is under Scottish law inoperative as to the Scottish immovable property. *A* is *T*'s heir under Scottish law. *A* is put to his election whether he will take the Scottish immovable property as heir, or the bequest of movable property as legatee (*u*).

3. *T*, domiciled in England, directs by will that "the whole of his property" should be divided equally amongst *A*, *B*, and *C*, his brothers and sisters. *T* leaves Scottish immovable property. The will, as to the Scottish immovable property, is invalid. *A* is *T*'s heir and takes the Scottish land. He is not put to his election, *i.e.*, he also takes his share as legatee. The reason is that the words "the whole of *T*'s property" do not show an intention to devise the Scottish immovable property (*x*).

4. *T* dies domiciled in England, leaving a will in which he disposes of English estate, and devises immovable property in Paraguay to trustees in trust for charitable purposes. The law of Paraguay imposes strict limits on the power of testamentary disposition, under which the devise is invalid to the extent of four-fifths as against the heirs under Paraguayan law. *E*, to whom the English estate is left under the will, is the heir under the law of Paraguay. In an action to administer the English estate, *E* is put to his election either not to take what he inherits under the law of Paraguay, or, if he does take it, to compensate the charity out of the English property which he takes under the will for what it has lost by four-fifths of the Paraguayan immovables passing under the law of Paraguay to *E* (*y*).

5. *T*, domiciled in Scotland, leaves by his will property including Scottish movables and land in Argentina to trustees for division among his children, *E*, *F*, and *G*. By a codicil he directs his trustees, in lieu of paying over her share to *G*, to hold it for her in life-rent, and after her death to divide it among her children who should then be alive and the issue of any who predeceased her, *per stirpes*. He also directs by his will that the provisions for his children therein must be accepted in lieu of legitim and of any other rights which they might assert by reason of his death, and that if any of them

(*t*) *Brodie v. Barry* (1813), 2 V. & B. 127.

(*u*) *Harrison v. Harrison* (1873), L. R. 8 Ch. 342.

(*x*) *Trotter v. Trotter* (1828), 4 Bli. 502. See also *Allen v. Anderson* (1846), 5 Hare, 163; *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705. Contrast *Orrell v. Orrell* (1871), L. R. 6 Ch. 302; *Harrison v. Harrison* (1873), L. R. 8 Ch. 342.

(*y*) *In re Ogilvie*, [1918] 1 Ch. 492.

should repudiate the settlement thus made under the will, or claim their legal rights, they were to forfeit all title to any share of his estate which he could dispose of by law. *G*, despite the will, claims, and is awarded legitim, but it is decided that this fact in no way lessens her children's rights under the will (*z*).

The devise of Argentine land is wholly invalid, because the law of Argentina declines to recognize any form of trust or settlement as applying to land, the purpose of the law being that land should always be held by owners who retain the free right of disposal. Under a judgment in the Argentine Court *E*, *F*, and *G* succeed on the footing of an intestacy to equal shares of the Argentine land. The children of *G* are thus deprived of their right to *G*'s share of the Argentine land on her death. They accordingly bring an action in the Court of Session in which they claim as against *E* and *F* that they should either secure them the interest in the Argentine land which was given to them under the will, or alternatively compensate them out of their shares of the Scottish property taken by *E* and *F* under the will. It is finally decided by the House of Lords, overruling the Court of Session, that no case of election arises (*a*).

Despite the conflict of opinion between the Court of Session and the House of Lords the decision in this case is, it is submitted, clearly in accordance with principle, if we bear in mind the fact that election (1) essentially implies the possibility of choice, and (2) is a doctrine of equity, from which it follows that it will not be pressed to yield inequitable results. Both these considerations would have been violated if the doctrine of election had been held to be applicable:—

(1) *E* and *F* in this case had no power to secure the children of *G* the interest in Argentine land which *T* desired them to have. No process could be devised by which, without violating the *lex situs*, the interest in question could be created. The case, therefore, fell under the rule laid down in *In re Lord Chesham* (*b*), when it was held that no case for election arose when *T* gave by will benefits to *E* and by the same will gave away chattels which under a settlement were attached to the mansion house of which *E* was tenant for life. The only dissentient judgment in the House of Lords was based on doubt as to whether this difficulty could not be surmounted.

(2) Had the doctrine of election been applied in these circumstances, it would have worked clear injustice and have defeated the plain intention of the testator, whose aim was to secure an equal

(*z*) [1916] S. C. 97.

(*a*) *Brown v. Gregson*, [1920] A. C. 860 (Lord Cave dissenting), reversing the judgment of the Court of Session, [1919] S. C. 438.

(*b*) (1886), 31 Ch. D. 466. Compare *Hewit's Trustees v. Lawson* (1891), 18 R. 793; *Douglas's Trustees v. Douglas* (1862), 24 D. 1191.

distribution of his property among his children. *G* had already secured legitim and an equal share with *E* and *F* of the Argentine land, *i.e.*, clearly more than *T* intended her and her family to have, and it would have been utterly inequitable to call on *E* and *F* to surrender part of their shares in *T*'s property for *G*'s children. The wishes of *T* could, of course, be simply carried out by *G* leaving the Argentine land to her children on her death.

Contrast on both points the Paraguayan case (Illustration 4). The law of Paraguay as accepted for the purpose of the case (*c*) imposes no prohibition of the disposition of land *inter vivos* to charitable ends; it merely—like the law of Scotland—imposes definite restrictions on the power of a testator to pass over his heirs when making his will. *E*, therefore, in that case had freedom to elect; he could legally hand over his Paraguayan land for the purpose of the charity, and take the whole of his legacy under the will. If he preferred to keep the land, he could have only the surplus of the value of the legacy over that of the land. Secondly, the making *E* elect was plainly equitable and in accordance with the intention of the will. The charity obtained what the testatrix intended, though in a different form, while *E* also obtained the bounty meant for him.

(*c*) It must be remembered that whatever the law of Paraguay may be, the Court knows it only as a fact which is proved or admitted by the parties for the purpose of the action. Otherwise it is assumed that the law of Paraguay does not differ from that of England. Cf. p. 789, *ante*.

INDEX.

ABSENT DEFENDER:

- jurisdiction of English Courts over, 49, 50, 251 *et seq.*
- of foreign Courts over, 50, 393 *et seq.*, 464.

ACCEPTANCE:

- of bills of exchange, law governing, 635.

ACCOUNT:

- action for, in respect of foreign land, 229.
- rate of exchange in connection with action for, in respect of foreign transactions, 660.

ACT OF IMPERIAL PARLIAMENT:

- extra-territorial effect of, 363, 364 *et seq.*, 483 *et seq.*, 573—579, 672, 675, 685.
- where inconsistent with foreign rights, 34, 35, 573—575, 661, 672—677, 725 *et seq.*, 744 *et seq.*

ACT OF INDEMNITY:

- effect of foreign, 704, 705, 769.

ACT OF SETTLEMENT:

- position of a naturalized British subject under, 191.

ACTION. (See also, *Jurisdiction and Procedure.*)

- in personam*, meaning of, 47—50, 241.
- in rem*, meaning of, 45, 46, 283, 822.
- stay of, 355—361.

ACTUS, LEX LOCI. (See *Lex loci actus.*)

ADJUSTMENT:

- of average, 629—631. (See *Average.*)

ADMINISTRATION:

- action, 352, 353.
- colonial grants of, 497.
- defined, 335, 337, 338.
- distinguished from succession, 53, 54, 870.
- English grant of, 338, 339.
- effect of, 374—377.
- extension of, to Ireland and Scotland, 381, 382.

ADMINISTRATION—*continued.*English grant of—*continued.*

extension of, to Colonies, 384.

immovables, as to, 378, 379.

movables, as to, property passing under, 377—381.

to whom made, where deceased had foreign domicil, 486—489.

foreign grant of, 485, 486.

administrator under, when suable in England, 493—495.

effect of, 485—489.

payment by English debtor to administrator under, 491, 492.

title to English movables under, 489—491.

Irish and Scottish grants of, 495, 496.

extension of, to England, 495, 496.

jurisdiction of English Court as to, 339—350, 867, 868.

effect of *Ewing v. Orr Ewing*, 352, 867, 868.

foreign movable where domicil in England, 376, 377.

power to restrain proceedings abroad, 376, 377.

where property in England, 339, 377.

jurisdiction of foreign Court as to, 427, 489.

all property locally situate, 427.

movables of deceased domiciled there, 427, 428.

movables, of, 53, 377, 709—712.

assets liable for English and foreign debts, 710.

distribution, 712. (See *Distribution of Assets.*)

domicil of deceased does not affect, 709.

lex fori governs, 709, 870, 871.

exception as to foreign assets, 711.

priority of creditors, as to, law governing, 710, 711, 871.

ADMINISTRATION OF JUSTICE ACT, 1920...280, 282, 395, 429,
462—465, 789, 817, 818.ADMINISTRATOR. (See *Administration and Personal Representation.*)

defined, 335, 336.

English, powers of, 376, 709, 710.

foreign, powers of, 489—493, 709, 710.

movables, duty as to distribution of, 710, 711.

property passing to, under English grant, 377—381.

ADMIRALTY:

claims as to, heard in English Courts, 280—284, 815.

action of restraint, 816.

bills of lading, 818.

bottomry bonds, 817.

building and repairing ships, 822.

carriage of goods, 818.

collisions, 819.

enforcement of foreign judgments *in rem*, 822.

mortgages of ships, 817.

ADMIRALTY—*continued*.

claims as to, heard in English Courts—*continued*.

necessaries to foreign ships, 821.

in other cases, 821.

possession of English ships, 815, 816.

possession of foreign ships, 816.

salvage, 819, 820.

torts in respect of goods carried in ships, 818, 819.

towage, 820.

use or hire of ships, 817, 818.

wages of seamen, 822.

judgments of foreign Courts of, 373, 414, 465—467. (See *Judgments, Foreign*.)

jurisdiction in matters of, 280—284. (See *Jurisdiction*.)

ADMIRALTY COURT ACTS, 280—284, 815—822.

ADOPTION. (See *Status*.)

status not yet recognised by English law, 37, 502, 503, 850.

AFFILIATION ORDER:

for posthumous child, not valid in England, 454.

AFFREIGHTMENT:

contracts of—

authority of master under, 591, 592, 625, 626.

average adjustment under, 629—631.

effect of contrary intention, 622, 623.

law of flag usually governs, 591, 621—626.

particular acts under, *lex loci actus* governs, 625.

where for through carriage, 626. (See *Carriage*.)

AGE. (See *Capacity*.)

AGENCY:

authority of agent, law governing, 656.

principal and third party's rights, law governing, 656—659.

AGENT:

jurisdiction through service of writ on, 246.

AGREEMENT TO SUBMIT:

as basis of jurisdiction, 272—275.

ALIEN. (See also, *Nationality and Status of Aliens*.)

bankruptcy jurisdiction over, 314, 315, 317, 319.

domicil of, if deported, 150.

English realty and personalty held by, 207—209, 801.

may have no nationality, 168, 199.

restrictions on, 187, 188, 208, 209—211.

right to sue aliens in England, 225.

when infants become, 202—204.

who are, 167, 197—205.

ALIEN ENEMY:

- can petition for divorce, when interned, 288, 810.
- disabilities of, 187, 188, 208—211.
- grant of probate on death of, 487.
- jurisdiction in respect of alien enemies, 809—813.
- nationality of child of, born on British territory, 172, 173.

ALIENAGE, DECLARATION OF, 199—201.**ALIENS RESTRICTION AMENDMENT ACT, 1919...188, 208—210.****ALIMENTARY PROVISION FOR HUSBAND:**

- under Scottish law, valid in England, 595.

ALLEGIANCE. (See also, *Nationality*.)

- as element in determining nationality, 169, 790, 807, 808.
- defined, 167.
- divorce jurisdiction, as affecting, 288, 422, 825.
- domicil, as affecting, 116, 117, 135, 797.
- jurisdiction founded on, 50, 393, 401, 402.
- oath of, and its effect, 186.
- one and indivisible, 50, 174.
- "permanent" and "temporary," distinguished, 167.

AMBASSADORS. (See also, *Jurisdiction*.)

- domicil of, 157.
- English jurisdiction over foreign, 216—222.
- foreign jurisdiction over, 388, 389.
- marriage at house of, 667—669.
- nationality of child of, 171, 181.
- Statute of Limitations does not run against, 221.
- waiver of diplomatic privilege by, 218, 220—222.

AMERICAN DECISIONS:

- importance of, 21.
- referred to, 46, 93, 127, 128, 130, 131, 133, 141, 230, 241, 452, 453, 490, 503, 554, 581, 593, 687, 701, 721, 734, 740.

ANCILLARY ADMINISTRATOR:

- defined, 710.

ANGLO-INDIAN DOMICIL:

- meaning and effect of, 159, 160, 669, 796, 797.

ANIMUS MANENDI:

- as involved in the ideas of "home" and "domicil," 84—87, 89, 109—117, 161.

ANNEXATION:

- effect on nationality, 183, 184, 192, 195, 197.

APPOINTMENTS, 740. (See *Powers of Appointment*.)**APPROBATE OR REPROBATE:**

- Scottish equivalent of election, 875, 876—878.

ARBITRATION CLAUSE IN CONTRACT:

relation to proper law of contract, 592.

ARGENTINE LAW:

forbids trusts of land, 876—878.

ARMY:

domicil of officer or man, 158.

marriage in lines of, 662, 672.

ARNOULD:

his work on "Marine Insurance" quoted as to average adjustment, 629, 631.

ARRANGEMENT:

Deeds of Arrangement Act, 1887...569.

under Companies Act, 371.

no discharge in Colonies, 371, 374.

ARREST ON MESNE PROCESS:

a matter of procedure, 763, 764.

ARRESTMENT TO FOUND JURISDICTION:

in Scotland, 57, 403, 404, 409, 410, 459, 461, 462.

ASSETS:

defined, 336. (See also, *Administration*.)

in bankruptcy, 706.

ASSIGNMENT. (See also, *Movables*.)

general and individual, distinguished, 560, 569, 570.

general, by bankruptcy, 364, 371, 471, 477.

death, 376, 385, 485, 709 *et seq.*, 716 *et seq.*

marriage, 690 *et seq.*

of bills and notes, 635. (See *Bills*.)

of debts, 565—568.

of movables, 560—571.

when governed by *lex domicilii*, 560, 561, 568—570.

by *lex situs*, 561—568, 570, 571.

when invalid as such, may be valid as contract to assign, 571.

ATTESTATION OF WILL:

in case of exercise of power of appointment, 751, 752.

ATTORNEY, 657. (See *Power of Attorney*.)

AUSTRALIAN STATES:

are countries in private international law, 71.

British possessions under Colonial Probate Act, 1892...384, 497.

AUTHORITY:

agent, of, 656.

foreign guardian, of, 517—520.

parent over child, 514—516.

power of attorney under, 657.

shipmaster, of, 625, 626.

AVERAGE:

- adjustment of, law governing, 629—631.
- liability for general, 629.
 - law of port of destination usually governs, 629.
 - law of port at which voyage lawfully broken, sometimes governs, 630.
 - need not be made up by average adjuster at port, 630.
- liability of English insurers on foreign ships, 631.
- underwriter bound by adjustment of, where, 630, 631.

BALDWIN, E. T.:

- his work on "Bankruptcy" quoted as to—
- acts of bankruptcy, 316, 317.

BANKRUPTCY:

- acts of, what are, 313, 314, 316, 317.
- administration in,
 - antecedent transactions, effect of, 707, 708.
 - double proofs governed by *lex fori*, 763.
 - fraudulent preference, effect of, 707, 708.
 - lex fori* generally governs, 706—708, 763.
 - set-off under foreign law permissible, 768.
- Colonial, effect of, 472, 473, 482, 484.
- concurrent bankruptcies, 327, 328, 476, 477.
- discharge of obligations under, 477—483, 847—849.
 - if in place where liability arose, 477—480, 848.
 - if in place where liability is to be satisfied, 478, 479, 848, 849.
 - impeachable for fraud, 485.
 - impeachable for lack of jurisdiction (?), 484, 485.
 - Imperial Act of Parliament, 483—485, 848.
 - not if in any other place, 480—483, 848.
 - not if under Companies (Consolidation) Act, 1908...483.
 - "proper law of the contract," by, 482, 848.
 - theoretical basis of extra-territorial effect of, 847—849.
 - when recognised in England, 477—480, 847—849.
- English, 364 *et seq.*
 - Colonial Courts bound by, 368, 369.
 - discharge of debtor by, 371.
 - extra-territorial effect of, 364—368.
 - over foreign immovables, 364, 366—368.
 - over foreign movables, 364, 366—368.
 - position of creditors who obtain payment out of foreign assets, 367, 368.
- foreign, 472 *et seq.*
 - assignment of property under, 472.
 - as affecting English immovables, 472, 473.
 - as affecting English movables, 473—476.
 - in Ireland and Scotland wherever situate, valid, 471, 472.
 - basis, theoretical, of rules as to, 847—849.

BANKRUPTCY—*continued*.foreign—*continued*.

concurrent bankruptcies, 476, 477.

general effect of, 472—476.

prior in date given effect to in England, 476, 477.

Indian, effect of, 471, 472, 483, 484.

Irish, effect of, 471, 472, 483, 484.

jurisdiction in matters of,

English Courts have no,

where no act of bankruptcy, 317, 318.

where person not a "debtor," 317, 318.

where not domiciled or ordinarily resident or carrying on business, if on creditor's petition, 259, 321, 322.

English Courts have jurisdiction,

Debtors Act, 1869, under, 321, 323.

on creditor's petition, 323—326.

on debtor's petition, 326, 327.

service of bankruptcy notice or petition out of England, 314, 322.

unaffected by foreign bankruptcy, 327, 328.

foreign Courts have, in what cases, 474.

Scottish, effect of, 471, 472, 483, 484.

BANKRUPTCY ACT, 1849...366.

BANKRUPTCY ACT, 1869...319, 326.

BANKRUPTCY ACT, 1883...322.

BANKRUPTCY ACT, 1914...260, 312 *et seq.*, 363, 364 *et seq.*, 471, 473, 474, 475, 476, 477, 479, 483, 693, 707.

BANKRUPTCY (SCOTLAND) ACT, 1913...365, 367, 471, 472, 474, 475, 476, 477, 483, 484.

BANKRUPTCY (IRELAND) AMENDMENT ACT, 1872...471, 473, 483.

BANKRUPTCY RULES, 1915...322.

BAR, L. VON:

his works quoted as to—

contracts invalid by *lex loci solutionis*, 35, 597.

interest, law governing, 654.

method of treating conflict of laws, 17, 20.

Story, his criticism of, 17.

title to *bona vacantia*, 717.

BARRISTER:

law of Bar governs right to fees, 605.

BELL, W.:

his "Dictionary of the Law of Scotland" quoted as to—
heritable bonds, nature of, 540.

BENTHAM:

his works referred to by way of illustration, 60, 62.

BILLS OF EXCHANGE. (See also, *Negotiable Instruments*.)

acceptance, law governing, 635, 639.
 amount of, how calculated, 643.
 assignment of, law governing, 561, 564, 565, 567.
 damages, measure of, on dishonour, 644—646.
 determined by proper law of contract, 646.
 in nature of re-exchange, 645, 646.
 date of payment, how determined, 643.
 definition of, 632, 636.
 definitions of terms connected with, 632—634.
 drawing, law governing, 635, 639.
 foreign, when negotiable, 648—654.
 foreign and inland bills, difference between, 633.
 form, law governing as to, 635, 636.
 as regards original form, 635, 636, 637.
 as regards subsequent dealings, 635, 636, 637.
 exceptional cases, 635, 636, 637, 638.
 general principles as to law governing, 634, 635.
 holder, law governing duties of, 642.
 indorsement, law governing, 635, 639.
 interpretation governed by *lex loci actus*, 639.
 issue, law governing, 635, 639.
 liability for, discharge from, law governing, 646.
 negotiable, how made, 648—654.
 negotiation of, what is, 635.
 not valid, if issued in England unstamped, 638.
 obligations under, governed by *lex loci actus*, 639.
 exception to the rule, 639.
 presentment of, law governing, 642.
 valid, though not stamped according to law of place of issue, 635, 636, 637.
 valuable consideration for, meaning of, 633.

BILLS OF EXCHANGE ACT, 1882. (See also, *Bills of Exchange*.)

extra-territorial operation of, 573.
 sect. 72 of, governs conflict of law as to bills and notes, 635.

BILLS OF LADING:

admiralty jurisdiction as to, 818.
 assignment of, law governing, 562, 569.
 law governing, 621—627. (See *Freightment*.)

BILLS OF SALE ACTS, 1878 AND 1882:

not applicable to transactions affecting Scottish or Irish goods, 570, 571.

BISHOP:

quoted as to Court of competent jurisdiction, 387.
 principle of effectiveness as basis of jurisdiction, 40.

BLACKSTONE:

- quoted as to civil death, 505.
- as to omission of rules as to conflict of laws, 4.
- as to process, 48, 251.

BONA VACANTIA:

- disposal of, under *lex fori*, 717, 718.

BONDS. (See also, *Heritable Bonds*.)

- foreign sovereign cannot be sued in England in respect of government, 650.

BOTTOMRY CONTRACTS:

- admiralty jurisdiction as to, 817.
- authority of master to make, governed by law of flag, 625, 626.

BOUNDARY:

- of foreign land, English jurisdiction over, 227.

BRITISH AND FOREIGN LEGAL PROCEDURE, COMMITTEE
ON, 58.

BRITISH DOMINIONS:

- definition of term, 68.

BRITISH EMPIRE:

- definition of term, 70, 71.

BRITISH ISLANDS:

- definition of term, 634.

BRITISH NATIONALITY ACT, 1730...178, 182.

BRITISH NATIONALITY ACT, 1772...178.

BRITISH NATIONALITY AND STATUS OF ALIENS ACTS, 1914
AND 1918...167 *et seq.*, 804—809. (See *Nationality*.)

BRITISH POSSESSION:

- definition of term, 384.

BRITISH SHIPS:

- admiralty jurisdiction as to, 280—284, 815—822.
- employment of aliens on, 209.
- ownership of, 207.
- situation of, at port of registry, 343.
- territorial character of, 72.

BRITISH SHIPS (TRANSFER RESTRICTIONS) ACTS, 1915 AND
1916...211.BRITISH SUBJECTS. (See *Nationality (British)*.)

- definition of, 167.
- kinds of, 167 *et seq.*
- law affecting, on high seas, 669, 670.

BROWNE, G.:

his work on "Probate Practice" quoted as to local situation of personal property, 347.

BUILDING, EQUIPPING OR REPAIRING SHIPS:

admiralty jurisdiction as to, 822.

BULLEN & LEAKE:

their "Principles of Pleading" quoted as to presumption of validity of foreign judgments, 444.

BUSINESS:

place of, as giving character of alien enemy, 812.

place of, as giving jurisdiction in bankruptcy, 313, 317.

place of, as giving jurisdiction in winding-up of companies, 331, 332.

principal place of, as regards domicile of corporations, 163. (See *Corporations*.)

BYNKERSHOEK:

his works referred to as to difficulty of defining "domicil," 794.

CANADA:

land in, treated as foreign land, 39, 228.

legality of marriage with deceased's wife's sister's daughter in, 678, 680, 681.

Revenue Act not enforceable in England, 233, 453.

CANADIAN PROVINCES:

British possessions under Colonial Probates Act, 1892...384.

CAPACITY. (See also, *Status* and *Contract*.)

as to contracts generally governed by *lex domicilii*, 577—580, 865, 866.

exceptional cases, 580—583, 865, 866.

as to immovables, governed by *lex situs* or proper law, 543, 544, 583, 855, 856.

as to marriage generally, 661, 663, 678—682, 865, 866. (See *Marriage*.)

as to marriages in uncivilised countries, 783.

as to movables, 560, 561, 721, 722, 735.

as to power of appointment exercised by will, 740, 743, 744.

as to receipt of legacy, 509.

as to wills, 543, 721, 722, 735.

CARRIAGE. (See also *Affreightments*.)

admiralty jurisdiction as to carriage of goods, 818.

contracts for "through carriage," law governing, 626—629.

CARVER, T. G.:

his "Carriage by Sea" quoted as to—

form of contract, 587.

law governing affreightment contracts, 621, 622, 623.

CASTE:

restrictions on marriage not recognised in England, 502, 684, 685.

CESSION OF TERRITORY:

effect on nationality, 183, 184, 197, 202.

CHALMERS, SIR M. D.:

on "Bills of Exchange" frequently quoted, 632 *et seq.*

CHAMPERTY:

invalidity of foreign contract involving, 589, 595, 600.

CHANGE OF DOMICIL:

effect on rights of married persons as regards movables, 689, 690, 691—693.

wills of personal property, 725, 729, 732—740.

wills, exercising power of appointment, 750.

CHANNEL ISLANDS, 72, 634.

CHARGE:

on foreign land, jurisdiction of English Court as to, 229, 230.

on land, position of, in English law, 540.

CHARITABLE BEQUESTS, 512, 548, 725.

CHARTER PARTIES. (See *Affreightment*.)CHATTELS PERSONAL. (See *Movables*.)

CHATTELS REAL:

generally included in immovables, 68, 75, 76, 77, 539, 540. (See also, *Leaseholds*.)

treatment of, on intestacy, 716.

CHEQUE. (See *Bills of Exchange*.)

CHETTI v. CHETTI:

case of, 289, 500, 502, 664, 683, 684, 839.

CHILDREN. (See *Infants and Minors*.)

for purposes of income tax, 522.

for purposes of legacy duty, 529.

interpretation of term in will or settlement, 531.

CHOICE, DOMICIL OF, 104, 109. (See *Domicil*.)

CHOICE OF LAW:

general principle as to, 59—64, 498, 499.

CHOSES IN ACTION. (See also, *Movables and Debts*.)

assignment of, 565—568.

defined, 75, 77.

in administration, 342, 491.

locality of, 342—347.

CITATION:

in divorce, &c. actions, may be served outside England, 285.

CITIZENSHIP:

British, 167 *et seq.*, 799—809. (See *Nationality*.)

CIVIL DEATH, 37, 502.

CIVIL PROCEDURE ACT, 1833...767.

CIVIL SERVICE:

aliens excluded from, 210.

CIVILIZED COUNTRY:

marriages in other than, 671, 672, 782, 783.

meaning of, 30, 31.

private international law is only concerned with, 31.

CLODE:

on "Petition of Right" quoted, 215.

COCKBURN:

on "Nationality" quoted, 171.

CODE NAPOLEON. (See also, *French Code*.)

rights of parents under, 516.

COHEN, RT. HON. A.:

article in "Law Quarterly Review" referred to, 577.

COLLISIONS. (See also *Compulsory Pilotage*.)

at sea, law governing, 700—703.

admiralty jurisdiction as to, 819.

COLONIAL LAWS VALIDITY ACT, 1865...669.

COLONIAL MERCHANT VESSELS:

law governing, 72, 621, 622, 669, 670, 699, 700.

COLONIAL PROBATES ACT, 1892...384, 385, 497.

COLONIES:

colonial bankruptcy, effect of, 473, 484.

colonial grant, extension of, to England, 497.

colonial judgments, extension of, to England, 462—465.

Colonial Probates Act, 1892...384, 385, 497.

Companies Acts do not extend to, 371.

divorces in British, 416.

England as "home" of colonist, 91.

English grants, extension to, 384, 385.

English judgments and orders, extension to, 462—465.

English lunacy orders, extension to, 363, 533, 534.

extension of English bankruptcy to, 364—371, 483—485.

extension of English vesting orders to, 363.

"foreign country" includes, 68, 71, 317.

marriage in, under Foreign Marriage Act, 1892...673.

naturalization in, 190, 191, 194.

powers as to aliens, 208.

COMITY, INTERNATIONAL:

- enforcement of foreign law, how far a matter of, 10, 11.
- meaning and use of the term, 15, 439, 440, 697.

COMMERCIAL DOMICIL, 100, 146, 812. (See *Domicil*.)

COMMITTEE OF LUNATIC:

- powers of, 533 *et seq.*

COMMON LAW:

- includes maritime law, 700, 701.
- regarding marriage, 662, 685.

COMMON LAW PROCEDURE ACT, 1852:

- jurisdiction under, 55, 56.

COMMONWEALTH OF AUSTRALIA:

- legislative powers as to British mercantile shipping, 72, 670.
- not a British possession for probate purposes, 384.

COMMUNITY OF GOODS:

- French law regarding, in case of husband and wife, 692.

COMPANIES:

- alien interests in, 209, 210.
- deed of arrangement does not bind foreign creditors, 373, 374.
- domicil of, 163. (See *Corporations*.)
- liability of members of, 406, 512, 513.
- limited, effect of, 512.
- residence of, 164, 165.
- service of writ on, 163, 244, 245, 511.
- unregistered, 329.
- winding-up of, 329.
 - English Court's jurisdiction, 329—334.
 - effect of English order, 371—374.
 - in case of foreign interests in, 210.

COMPANIES (CONSOLIDATION) ACT, 1908...165, 244, 245, 329—334, 363, 371—374, 483.

COMPANIES (FOREIGN INTERESTS) ACT, 1917...210.

COMPULSORY PILOTAGE:

- as affecting liability in tort, 704.

CONFIRMATION:

- of English grant in Scotland, 382, 383.

CONFIRMATION AND PROBATE ACT, 1858...382, 383, 497, 867.

CONFISCATION OF PROPERTY BY FOREIGN GOVERNMENT, 504, 561, 562, 615.

CONFLICT OF LAWS:

- accuracy of expression, 12, 13.
- bill of exchange and the, 636, 637.
- meaning of term, 3, 5 *et seq.*
- rules concerning,
 - development of, later than territorial law, 7, 8.
 - growth of, reasons for, 8—10.
- value of general principles, in the study of, 64, 65.

CONJUGAL RIGHTS:

- restitution of, 296—300.

CONSENT OF PARENTS:

- part of form of marriage, 507, 664, 665, 831.

CONSTRUCTION:

- based on intention of parties, 61—64.
- of bills and notes, 639—641.
- of contracts generally, 602—615.
- of contracts as to immovables, 544—546, 553, 618—620.
- of marriage settlements, 553—556, 687—690.
- of particular contracts, 618 *et seq.*
- of wills, 731, 732.
 - exercising powers of appointment, 754—758.

CONSULAR COURTS:

- probates granted by, recognition of, in England, 384.

CONSULS:

- domicil of, 157, 158.
- marriages before British, 673.
- nationality of children of, 181.
- powers of administration of property of deceased nationals, 487.

CONTINENTAL JURISTS:

- method of treating private international law, 16 *et seq.*

CONTRACT:

- capacity as regards,
 - generally governed by *lex domicilii*, 577—580, 831—833.
 - immovables, contracts relating to, 544, 855, 856.
 - mercantile contracts, query if *lex loci* governs, 580—583, 832, 836.
 - uncivilised countries, contracts in, 783.
- damages for breach of, as affected by rate of exchange, 659, 660.
- definition of, 572.
- discharge of. (See also, *Bankruptcy.*)
 - depends on the "proper law," 480—482, 615—617.
 - exception in case of a confiscatory law by enemy State, 615.

CONTRACT—*continued*.

form of,

generally governed by *lex loci contractus*, 583—585, 635, 832.

exceptions:

bills of exchange and notes in certain cases, 588.

contracts as to immovables by *lex situs*, 544—546, 585.

but in certain cases by *lex loci contractus*, 855, 856.

contracts as to movables sometimes by *lex situs*, 586.

contracts intended to operate wholly in another country (?), 586—588.

in uncivilised countries, 783.

interpretation and obligation of, 61.

generally governed by the "proper law of contract," 62, 482, 602—604, 621—625, 635.

contracts as to immovables, 544—546, 553, 618—620.

marriage settlements, 546, 553—556, 685—690.

made without consideration, validity of, 60, 589, 592.

performance by parties prevented, 597—599.

"proper law of," what is, 482, 553, 572, 573, 588, 590, 602—615.

criteria of, 606 *et seq.*

immovables, contracts as to, how affected by, 544—546, 553, 618—620, 851—856.

intention, effect of, on, 606 *et seq.*

presumption as to, in favour of *lex loci contractus*, 609, 612.

presumption as to, in favour of *lex loci solutionis*, 609, 610, 612, 613.

quasi-contracts, 703.

unenforceable by English procedure, 575—577.

extra-territoriality, proof of, not necessary in case of, 576, 577.

validity of,

as to immovables, 544—546, 851—855.

as to movables, 573 *et seq.*

Act of Parliament, by, 573—575.

essential validity governed generally by "proper law of contract," 588—593, 832, 861—865.

intention of parties, in relation to, 589, 859, 863, 864.

meaning of, 589.

other theories as to essential validity, 857—861.

exceptions:

where contrary to policy of English law, 593—595, 862.
compounding an offence, 785.

criticism of *Kaufman v. Gerson*, 784—786.

where making unlawful by *lex loci contractus* (?), 595—597, 859.

where performance unlawful by *lex loci solutionis*, 597—599, 862.

except as to revenue laws, 597, 599.

uncivilised countries, contracts in, 783.

CONTRACT—*continued*.

- particular contracts, law governing, 618 *et seq.*
- affreightment, 621. (See *Affreightment*.)
- agency, 656. (See *Agency*.)
- average, 629. (See *Average*.)
- bills and notes, 632. (See *Bills of Exchange*.)
- immovables, as to, 542, 543—546, 618, 851—856. (See *Immovables*.)
- interest, as to, 654. (See *Interest*.)
- marriage. (See *Marriage*.)
- marriage settlements, 546, 553—556, 685—693. (See *Marriage Settlements*.)
- movables, as to, 586, 620. (See *Movables*.)
- negotiable instruments, foreign, 650, 651.
- through carriage, 626—629.

CONTRACTUAL THEORY OF DIVORCE, 823, 824.

CONVERSION:

- of immovables into movables, 541.

CONVEYANCE. (See *Assignment* and *Immovables*.)

CONVICT:

- domicil of, 150.

COOLEY:

- his work on "Constitutional Limitations" quoted, 684.

CO-PARTNERS:

- jurisdiction over, in firm name, 275—278, 815.

COPYRIGHT:

- exclusive jurisdiction of English Court over, 239.

CO-RESPONDENT:

- damages against, enforceable under Judgments Extension Act, 1858...459.
- jurisdiction of English Courts over, 290, 291.
- jurisdiction of foreign Courts over, 419, 420.
- recovery in English Court of costs awarded by foreign Court against, 452.

CORPORATIONS:

- capacity, law governing, 512.
- domicil of, 163—166.
 - can there be more than one? 165.
 - differs from that of members, 163.
 - fixed at particular place, must be, 164.
 - non-trading corporations, 165.
 - no distinction between residence and, 163.
 - trading corporations, 164, 165.
- liability of members of, 406, 512, 513.

CORPORATIONS—*continued*.

- residence of, 163.
- restrictions on enemy-controlled, 211.
- service of writ on, 163, 244, 245, 511.
- status of, 511—513.
- winding-up of, 329, 331.

COSTS:

- against co-respondent, when recoverable, 290, 291, 452.
- alien, if resident in England, not obliged to give security for, 234, 762.
- awarded in foreign revenue case, not recoverable in England, 453.
- matter of procedure, 762.

COUNTER-CLAIM:

- alien enemy, in actions against, 811.
- foreign ambassadors or sovereigns, in actions by, 221, 222.
- governed by *lex fori*, 761, 768.
- vexatious, when it is, 355.

COUNTRY. (See also, *State*.)

- definition of, 4.
- geographical meaning of, 69.
- two meanings of, 69—71.

COURT:

- definition of, 67.
- "of competent jurisdiction," meaning of, 40, 386, 387, 388, 429—431.
- "proper Court," meaning of, 386, 387, 429—431.

COURT OF APPEAL:

- bound by its own decisions, 789, 865.

COURT OF PROBATE ACT, 1857...342.

COURT OF PROBATE ACT, 1858...357.

CREDITOR:

- jurisdiction in bankruptcy on petition by, 323—326.
- priorities of, law governing, 548, 707, 710.

CRIMES:

- how far actionable as torts, 695—698.

CRITERIA OF JURISDICTION. (See *Jurisdiction*.)

CROWN:

- actions against the, 215.
- nationality of children of persons in service of, 176, 180, 181.
- residence abroad in service of, in connection with naturalization, 185, 186.

CURATOR BONIS:

- under Scottish law, rights of, in England, 520, 534, 536.

CURATORS:

rights of foreign, in England, 535—538. (See *Lunatics*.)

DAMAGE:

admiralty jurisdiction as to, done or received by ships, 819.

DAMAGES:

measure of, on dishonour of bills, 644—646.

rate of exchange as affecting, for breach of contract or tort, 659, 660.

DANISH LAW:

restriction on action for breach of promise under, 765.

DEBTOR:

definition of, in Bankruptcy Act, 312, 313.

jurisdiction in bankruptcy on petition by, 326, 327.

DEBTORS ACT, 1869:

bankruptcy jurisdiction under sect. 5 of, 321, 323.

DEBTS:

assets liable for English and foreign, 709, 710, 871.

assignment of, law governing, 565—568.

immovable security for, void, if debt void by *lex loci contractus*, 854.

locality or situation of, 342—347, 491, 565, 568.

priority in payment of, 548, 707, 710.

procedure in recovery, governed by *lex fori*, 566, 567.

rate of exchange as affecting amount of, 659, 660.

rights of foreign personal representative with reference to, 490, 491.

rights to foreign, of English administrator, 379—381.

specialty, rules as to *situs* of, 343, 345, 348, 350.

when treated as immovables, if secured on immovables, 343, 540, 870.

when treated as reduced into possession, 491.

DECEASED BROTHER'S WIDOW:

Marriage Act of 1921 referred to, 664, 676, 681.

DECEASED WIFE'S SISTER:

Marriage Act of 1907 referred to, 573, 681.

DECLARATION OF ALIENAGE, 198—201.

DEEDS OF ARRANGEMENT ACT, 1887...569.

DEFINITIONS:

of topics discussed, 1 *et seq.*

of various terms used in this work, 67—79.

DELICTS, 694. (See *Torts*.)

DENIZART:

his definition of "domicil" quoted, 791.

DENIZATION, 168, 191. (See *Nationality*.)

DEPENDENT PERSONS:

domicil of, 126—139. (See *Domicil*.)

home of, 91.

meaning of term, 68, 73—75.

DEPORTEE:

domicil of, 150.

wife's domicil, 135.

DESCENT:

nationality based on, 176—181, 809.

DESERTED WIFE:

divorce of, 827, 837, 838, 845.

domicil of, 135.

DICEY, A. V.:

article in "American Law Review" referred to, 634.

his "Law of the Constitution" referred to, 681.

his "Parties to an Action" referred to, 233, 234.

DIPLOMATIC AGENTS, 216, 217, 218, 388, 389. (See *Ambassadors*.)

DIPLOMATIC PRIVILEGES ACT, 1708...216, 220.

DISBURSEMENTS:

admiralty jurisdiction as to, 822.

DISCHARGE:

contracts, from, 615—617. (See *Contracts*.)

English bankruptcy, under, 371, 483—485, 847—849.

foreign bankruptcy, under, 477—483, 847. (See also, *Bankruptcy*.)

from English debt by debtor's payment to foreign personal representative, 491, 492.

DISCOVERY:

cannot be granted in respect of proceedings as to foreign lands, 225.

DISHONOUR:

laws governing duties of holder of bill, as to, 642.

measure of damages on, 644.

DISTRIBUTION OF ASSETS:

administrator, by, 713, 714.

Court, by the, 714, 715.

law governing on death is *lex domicilii* at death, 712, 713, 870, 873.

DIVORCE. (See also, *Judicial Separation*.)

by action of parties, not recognized in English law, 840.

Colonial divorces,

jurisdiction based on domicile, 836, 837.

case of deserted wife, 836, 837, 846.

effect of, on domicile of wife, 138, 139.

effect of, on nationality of wife, 185, 197.

English divorces,

allegiance of parties immaterial, 285, 288.

domicil at date of marriage immaterial, 285, 288, 289.

exceptional cases of jurisdiction, 294, 826 *et seq.*, 866.

jurisdiction of, generally based on domicile, 43, 46, 285, 291.

over co-respondent though not domiciled in England, 290, 291.

place of marriage immaterial, 285.

place of offence immaterial, 285, 287.

residence of parties immaterial, 285, 288.

serving citation out of England, 285.

suggested amendments of law, 833, 835—838.

validated by Act of Parliament, 293.

when English marriage is annulled by foreign Court, 294, 826 *et seq.*, 866.

foreign divorces,

effects in England, 468, 469.

general rule as to basis of jurisdiction, 43, 285, 291.

jurisdiction generally based on domicile, 416—423.

of English marriages, 416, 417, 418, 420, 841—843.

of foreign marriages, 416, 418, 422.

on grounds not recognized in England, 418, 840, 841.

over co-respondent though not domiciled, 419, 420.

pretence of domicile invalidates, 418, 436, 437.

jurisdiction occasionally not based on domicile, 422, 423.

jurisdiction based on nationality, 422.

Scottish divorces of English marriages, 420, 421, 843—845.

theories as to, 823.

(1) contractual, 823, 824, 841—843.

(2) penal, 824, 825, 843.

(3) status, 825.

Indian divorces,

Divorce Act of 1869 quoted, 421, 845.

domicil in India necessary for, 421, 846.

residence in India insufficient for, 421, 846.

validation in England of divorces not based on domicile, 421, 847.

law of the *renvoi* in connection with, 422, 423, 780, 781.

restrictions on the remarriage of divorced persons, 468, 469, 503.

variation of marriage settlement on divorce by English Courts, 686.

DOMICIL. (See also, *Lex domicilii*.)

analysis of term, 83 *et seq.*

Anglo-Indian, meaning of, 159, 160, 796, 797.

rules as to, 159, 357.

area of, 94—98.

as distinct from personal law, 839.

ascertainment of,

general rule, 139.

legal presumption arising from

actual presence, 140.

ascertained former domicil, 141.

choice, domicil of,

abandonment of, mode of, 121—123.

animo et facto, 122.

effect of, 123—126.

acquisition of, by residence and intention, 109—117.

by other means impossible, 117—120.

determined by English Court on English principles, 119, 120.

in itinere, not possible, 117, 118.

allegiance need not be changed, 115, 116.

foreign law not affecting acquisition of, 119, 120.

possible exception, 135, 295, 828.

home differs from, 111. (See *Home*.)

intention, nature of, required for, 113—117.

must amount to purpose or choice, 113—115.

must be to reside permanently or indefinitely, 115.

must be to abandon former domicil, 116.

need not be to change allegiance, 116.

meaning of, 104, 105.

residence necessary for acquisition of, 112.

commercial, 100, 146, 740—745, 812.

corporations, of, 163—166. (See *Corporations*.)

death, place of, its relation to, 141.

definition of, 68, 72, 83, 790—799.

difficulties attending attempts at, 793—800.

special difficulty in certain cases, 796—798.

Anglo-Indian cases, 159, 160, 796, 797.

allegiance cases, 797.

health cases, 153—156, 797, 798.

true test of good, 796, 798.

definitions of, various ones criticised, 790 *et seq.*

Denizart, 791.

French Code, 791.

Italian Code, 791.

Kindersley, V.-C., 793, 798.

Phillimore, 792, 798.

Pothier, 791.

DOMICIL—*continued.*

definitions of, various ones criticised—*continued.*

Roman law, 790.

Savigny, 791.

Story, 97, 792, 798.

Vattel, 791.

dependent persons, of, 74.

general rule, 126.

not acquired by their own act, 136, 137.

last domicile *primâ facie* retained, 137, 138.

insane persons, 131, 132.

married women, 134—137, 293, 828.

when marriage declared null, 139, 302, 303.

minors, 127, 136.

does not acquire power to change by marriage, 136, 137.

guardian, how far domicile of, can be changed by, 129—131.

guardian or mother, how far fraud of, affects, 131.

illegitimate, rules as to, 106—109, 127, 128.

legitimate, rules as to, 106 *et seq.*, 127 *et seq.*

legitimated, rules as to, 106—109, 127, 128.

remarriage of mother, how it affects, 133, 134.

widow's change of domicile, effect of, on, 129.

without living parents, 130, 131.

deserted wife, of, 134, 135, 826—828, 837, 838.

divorced woman, of, 138, 139.

effect of change of. (See *Change of Domicil.*)

evidence of, 142 *et seq.*

expressions of intention, effect of, as, 144.

length of time of residence, effect of, as, 145, 146.

mode of residence, effect of, as, 147.

residence is generally *primâ facie*, 145.

residence sometimes not *primâ facie* in case of, 147.

ambassadors, 145, 148, 157.

Anglo-Indian domicile, 159, 160.

consuls, 157, 158.

convicts, 150.

ecclesiastics, 160.

exiles, 150—152.

invalids, 153—156.

lunatics, 74, 152, 153.

military persons, 158.

naval persons, 158.

officials generally, 156, 157.

refugees, 150—152.

servants, 160.

students, 160.

forensic, meaning of, 100.

DOMICIL.—*continued.*

general rules as to, 83 *et seq.*

no person can in law be without a domicile, 98, 99.

no person can have more than one domicile, 99—103.

domicil once acquired is retained until changed, 104.

residence and *animus manendi* sole constituents of domicile, 162.

home, relation to, 84—94. (See *Home.*)

not identical with, 92—94.

intention as affecting, 113—117, 144.

judicial separation, as affecting, 135.

jurisdiction based on, 49, 52—55, 258—261, 401, 407, 408.

in bankruptcy proceedings, 321, 322, 474, 475. (See *Bankruptcy.*)

in divorce proceedings, 43, 285, 291, 416, 420, 826—838. (See *Divorce.*)

in actions in *personam*, 258—261, 401, 407, 408. (See *Jurisdiction.*)

in separation proceedings, 296, 298, 299.

in nullity proceedings, 301—304, 424—426.

legitimation depends on paternal, 521—533.

matrimonial, meaning of, 554, 555, 687 *et seq.* (See *Matrimonial Domicil.*)

nationality and, distinction between, 106—108.

tendency of foreign jurists to abolish, 107.

necessary, 149.

origin, domicile of,

birth, every person receives at, 104, 106.

fiction of law, is a, 106.

foundlings, of, 106, 108, 140.

general nature of, 104, 105.

how lost, 121—124.

illegitimate persons, of, 106, 108.

legitimate persons, of, 106, 108.

legitimated persons, of, 106, 108, 109.

loss of, impossible without new domicile, 121—124.

posthumous children, of, 106, 108.

resumption of, 124—126.

whether domicile acquired later than birth can be regarded as, 104, 105.

plurality of domicils, 99—103.

different domicils for different purposes, 99—103.

no person can have more than one, 99.

exception under Domicile Act, 1861...102, 103.

peculiar case of corporations sole, 165.

presumption of law as to, arising from actual presence, 140, 141.

ascertained former domicile, 141, 142.

origin, domicile of, 106, 121.

DOMICIL—*continued*.

- residence, definite place of, not necessary for, 94—98.
- difference between, and, 101, 112, 259. (See *Residence*.)
- status, how related to, 115, 504 *et seq.*
- various views as to, 506—508.
- uncivilised countries, in, 782.
- widow's, 138.

DOMICILE ACT, 1861...102, 103, 487.

DOMINION:

- definition of self-governing, 193.
- troops, divorce of, 827.

DONATIO MORTIS CAUSA:

- validity of, governed by *lex situs*, 561.

DONEE OF POWER OF APPOINTMENT:

- capacity to exercise, law governing, 740—744.
- forms in which power may be exercised, 744—758.
- material validity of exercise of power by, 758—760.

DONOR OF POWER OF APPOINTMENT:

- position relative to donee, 741, 742.

DRAWER:

- of a bill, law governing position of, 639. (See *Bills of Exchange*.)

DUTCH LAW:

- restriction on testamentary power under, 760.
- right of father to children's property under, 516.

ECCLESIASTIC:

- domicil of, 160.

EFFECTIVE JUDGMENT:

- meaning of, 41, 42.
- power to give, as basis of jurisdiction, 40—43, 45 *et seq.*, 223, 399.

EGYPT:

- British subject can acquire domicil in, 88, 93, 291.
- nationality as British not acquired by birth in, 170.
- renvoi* in Egyptian law, 552, 781.

ELECTION:

- rules as to, in case of wills, 872—878.

EMANCIPATED MINOR, 509.

EMBASSY:

- marriage at, 667—669, 673.

EMIGRANT:

- domicil of, 117, 118, 146, 148.

ENEMY. (See *Alien Enemy*.)

ENGLAND:

defined for purposes of this work, 68.
meaning of, explained, 71.

ENGLISH CONTRACT, 590, 619, 629.

ENGLISH LAW:

applicable to British ships, 72, 669, 670, 699.
as national law of British subjects, 669, 779.

ENGLISH MARRIAGE:

divorce of, 416—420, 841—844.

ENGLISH WRITERS:

their method of treating private international law, 17 *et seq.*

EQUITABLE INTERESTS:

in foreign lands under English law, 225—230, 545, 546.

EQUITABLE JURISDICTION:

to remedy defective execution of appointment, 751.

EQUITY:

acts *in personam*, effect of rule on jurisdiction, 226—229.
remedies of, a matter of procedure, 765, 766.

ERROR:

validity of foreign judgments not affected by, 444—447.
validity of rights of third parties under grant of administration
made in, 427.

ESSENTIAL VALIDITY:

of contract, 593—599.
of will, 721, 723—725, 736, 758—760.

EVIDENCE:

governed by *lex fori*, 761, 766, 767. (See *Procedure*.)

EXCHANGE, RATE OF:

damages for breach of contract or tort as affected by, 659, 660.

EXECUTION OF POWERS OF APPOINTMENT:

capacity for, 740—744.
formal validity of 744—757.
material validity of, 758—760.

EXECUTOR *DE SON TORT*:

foreign administrator, who acts without English grant in England,
is, 485, 491.

EXECUTORS. (See *Administration*.)

EXILE:

domicil of, 150—152.

EXPATRIATION:

conditions and effect of, 198—201. (See *Nationality*.)

EX-TERRITORIAL LAW, .4. (See *Law*.)

in case of British subjects, is probably English law, 669, 670, 674, 779.

EX-TERRITORIALITY:

English bankruptcy, of, 364—369. (See *Bankruptcy*.)

English judgments, of, 362, 363.

English winding-up order, of, 363, 371. (See *Companies*.)

English grant of administration, of, 374. (See *Administration*.)

Gaming Acts, of, 576, 577.

imperial Act of Parliament, of, 363, 364, 483, 573, 574, 672, 675, 685.

marriage, as affecting form of, 662, 667—669.

not normally enjoyed in England by British subjects, 219, 668.

of ambassador's or diplomatic agent's house, 667.

of sovereign, 215—217.

EXTINCTION OF OBLIGATIONS. (See *Discharge*.)FACTOR *LOCO TUTORIS*:

right of, to property of Scottish minor in England, 520.

FAMILY RELATIONS:

by what law governed, 514 *et seq.* (See also, *Parent, Guardian, Husband and Child*.)

FARWELL, SIR G.:

"Concise Treatise on Powers" cited, 755, 758.

FINANCE ACT, 1894...346, 381, 382, 496.

FIRM. (See *Partnership*.)FLAG, 621. (See *Law of Flag*.)

FÆLIX:

his method referred to, 15, 19.

FOOTE, J. A.:

his work on "Private International Law" referred to as to—
bankruptcy, recognition of foreign, 477.

contract, law governing capacity to, 577, 580.

contract, law governing validity of, 588, 859, 860, 862.

contract, law governing interpretation of, 602.

domicil of wife deserted by husband, 134.

equity, acting *in personam*, 223.

foreign administrator, title of, 491.

legitimated child succeeding to English leaseholds, 532.

lex loci contractus, contract made unlawfully, 595.

priority of creditors in administration, 710.

FORECLOSURE:

of mortgages of foreign land, 229, 854.

FOREIGN:

definition of, 67, 71, 317, 815, 820.

sometimes used in restricted sense, 102, 167, 639.

FOREIGN ADMINISTRATOR:

powers of, 489—493, 709, 710.

FOREIGN COMPANY:

jurisdiction to wind up, 332, 333.

FOREIGN COUNTRY:

definition of, 68, 71, 639.

law of, not enforceable by English Court, in, 224.

FOREIGN COURTS. (See *Judgments, Foreign, and Jurisdiction* (iii).)**FOREIGN DECISIONS:**

use of, 21.

FOREIGN FACTORIES:

marriages at, 667.

FOREIGN GUARDIAN:

authority of, 517—520, 548.

FOREIGN HEIR:

election by, 873—878.

FOREIGN INTERESTS:

legislation as to, in companies, 210.

FOREIGN JUDGMENTS. (See *Judgments.*)**FOREIGN LAND.** (See *Immovables.*)

includes land in Dominions, 39.

FOREIGN LAW:

acts contrary to, will not be enforced by English law, 597—601, 619, 854.

assumed to be same as English unless contrary proved, 789, 878.

confiscatory, when recognized in England, 562, 615.

does not affect acquisition of domicile, 119, 120.

possible exception, 135, 295, 828.

retrospective, when recognized, 704, 705, 713, 760.

FOREIGN MARRIAGE ACT, 1892:

effect of, 29, 34, 573, 574, 661, 662, 663. (See *Marriage.*)

FOREIGN SHIP:

nationality of child born on, in British waters, 173—175.

when jurisdiction over, exercised, 216, 816 *et seq.*

FOREIGN SOVEREIGNS. (See *Sovereigns*.)

English Courts will not enforce interference with authority of,
34, 39.

FOREIGNER. (See also, *Alien*.)

bankruptcy jurisdiction over, 317, 319.

FORM:

bills of exchange, 635—639.
contracts, of, 583—588. (See *Contracts*.)
immovables, of contracts, &c., as to, 544—546, 585.
marriage, of, 661 *et seq.*
marriage settlement, 587, 588, 686.
movables, of alienation of, 561—571.
wills, of, 556, 557, 722, 723, 725—730. (See *Wills*.)
wills exercising power of appointment of, 744—753.

FORUM. (See also, *Lex fori* and *Jurisdiction*.)

obligationis, 55, 262 *et seq.*, 265, 409, 410—412.
rei sitæ, 413—415.

FOUNDLING:

domicil of, 106, 108, 140.

FRASER:

on "Husband and Wife," referred to—
as to capacity to contract, 510.
as to change of domicil, 115.
as to divorce, 843, 844.
as to legitimation, 527.
as to marriage, 672.
as to status in connection with contract, 510.

FRAUD:

change of minor's domicil impeachable for, 131.
foreign bankruptcy, discharge impeachable for, 485.
foreign judgment impeachable for, 433—439.
rights of third parties under judgments voidable for fraud, 427,
442—444.

FRAUDS, STATUTE OF:

effect of, 546, 555, 556, 575, 764, 765.

FREIGHT. (See *Affreightment*.)

FRENCH CODE:

community of goods of husband and wife under, 556, 692.
deed of gift under, 570.
definition of "domicil" quoted, 791.
form of marriage, 295, 304, 831.
restriction on testamentary capacity, 760.

FRENCH CONTRACT, 590.

- GAMING ACT, 1835...576.
- GAMING ACT, 1845...457, 465, 575, 576.
- GAMING ACT, 1892...575.
- GAMING CONTRACTS, 454, 465, 575, 576, 591.
- GENERAL AVERAGE, 629. (See *Average*.)
- GENERAL MARITIME LAW:
conception of, 701.
- GERMAN CIVIL CODE:
rule as to *renvoi*, 778.
- GOODS. (See *Movables*.)
distinction between, and choses in action, 75.
- GOODWILL:
situs of, 346.
- GOUDY, H.:
on "Law of Bankruptcy in Scotland," referred to—
· as to definition of bankruptcy, 472.
as to effect of special bankruptcy rules, 708.
- GOVERNMENT OF IRELAND ACT, 1920...381, 459, 495.
- GREEK LAW:
as to marriage, 295, 828.
- GRETNA GREEN MARRIAGES:
validity of, 665, 833.
- GUARDIANSHIP:
appointment by English Court of guardian for British minor domiciled abroad, 520.
appointment of foreign guardian must be by Courts of domicile, 520.
guardian *ad litem* for foreign minor, 520.
authority of foreign guardians in England, 517, 519.
rights of foreign guardians over child's movables in England, 519.
520.
over child's immovables in England, 548.
- HALL, W. E.:
his "International Law" quoted as to foreign sovereigns and ambassadors, 216, 220, 388, 389.
- HANOVERIANS:
nationality of, during personal union of Kingdoms, 170, 197.
- HANSON, A.:
on "Legacy and Succession Duty," quoted as to—
locality of debts, 343, 345.
locality of shares, 348.

HEALTH CASES:

bearing of, on doctrine of domicil, 153—156, 797, 798.

HEIR:

right, of recourse of, 870—872.

to real property, must be born in wedlock, 527, 528, 530, 531, 851.

to real property in England, or foreign immovables, doctrine of election by, 872—878.

HERITABLE BONDS:

recognised here as immovables when immovables in Scotland, 540, 870.

HEYWOOD AND MASSEY:

on "Lunacy Practice," referred to, 536, 537.

HIGH SEAS:

law governing British ships on, 72, 670.

torts on, by what law governed, 699. (See *Torts*.)

HINDU:

marriage with, law regarding, 289, 502, 839.

HIRE OF SHIPS:

admiralty jurisdiction as to, 817, 818.

HOLDER:

under Bills of Exchange Act, 1882...633.

HOLLAND, SIR T. E.:

his "Jurisprudence" referred to, 3, 11, 12, 14, 15, 498, 500.

HOME:

abandonment of, 89—91.

acquisition of, whether coinciding with abandonment of, 89—91.

definition of, 85.

dependent persons, what is their, 91.

difference from domicil, 93, 94.

domicil compared and contrasted with, 68, 92—94.

domicil of choice not identical with, 111.

illustrations of definition of, 85—87.

intention to reside an essential of, 86, 87.

married women's, 135.

meaning of, 84 *et seq.*

most persons have a, 88.

plurality of, 89.

residence, how far essential as regards, 84—87.

results of the definition of, 88—91.

HUSBAND AND WIFE:

married woman's domicil, 134—137, 139, 293, 302, 303, 828.

proprietary rights, 546, 553—556, 685—693, 787. (See *Marriage Settlement*.)

effect of *De Nicols* cases, as to, 554—556.

HUSBAND AND WIFE—*continued*.

- relations between, what law governs, 514.
- right to maintenance, each by the other, 693.
- succession on death to each other, 690—693.
- wife's capacity to contract, law governing, 582, 693.

ILLEGITIMATE CHILD:

- domicil of, 106—109, 127, 128.
- nationality of, 171, 181, 183.

IMMOVABLES:

- bankruptcy, effect of, upon, 364, 366, 471, 472, 473.
- capacity to deal with, governed by *lex situs*, 543, 544, 583.
- chattels real usually included in, 75, 76, 475, 530, 532, 716.
- contracts as to, governed by *lex situs* generally, 544—546, 553, 618—620, 851—856.
 - exceptions to this rule, 544—546, 553—556.
- conveyances of, governed by *lex situs*, 542, 544, 545.
 - invalid by *lex situs*, may be valid as contracts or equitable mortgages, 544—546.
- definition of, 68.
- devolution of, governed by *lex situs*, 527, 547, 548, 716, 869, 870.
- equitable mortgage of, 545, 546.
- explained and compared with "real property," 75, 76, 77.
- foreign judgments as to. (See *Judgments*.)
- foreign land, equitable interests in, 225—230, 544—546.
- formalities as to, governed by *lex situs*, 544—546, 585, 851—856.
- general rule as to law governing, 542.
- heritable bonds, 540, 870.
- jurisdiction as to foreign, 223—230, 351, 694, 695.
 - where defendant out of England, 226, 227.
- jurisdiction in respect of English, where defendants out of England, 254—258.
- law determining what are, 539—541.
- leaseholds included in, 75, 76, 77, 530, 532.
- lex situs* governs rights over, 37, 542.
 - exceptions to this rule, 553—559, 787.
 - assignment of bankrupt's property, 557.
 - contracts, effect of, 553—556, 852—856.
 - husband's and wife's rights, 553—556, 787.
 - limitation of actions, 557—559.
 - wills of personal estate of British subjects, 556, 557, 725—730, 787.
- limitation of actions as to, governed by *lex fori* (?), 557—559.
- marriage, effect on, 546, 553—556, 787.
- mortgages of, treated as immovable property, 72, 343, 540.
- prescription, title by, 548.
- proceeds of, treated as movables, 541.
- security for debt void by *lex loci contractus* also void, 854.

IMMOVABLES—*continued*.

- Story's theory as to law governing contracts as to, 542.
- succession to, governed by *lex situs*, 544, 547, 548.
- title to, actions as to, foreign, 223—225.
- trespass to, actions as to, foreign, 223—225, 694, 695.
- wills of English, under Wills Act, 1861...556, 557. (See *Wills*.)
- wills of, governed by *lex situs*, 547, 548.

IMPERIAL CONFERENCE, 1921:

- resolution as to nationality, 176, 809.

IMPERIAL NATURALIZATION, 193, 194, 809.

IMPOSSIBILITY OF LOCAL FORM OF MARRIAGE:

- English form available, 671, 672, 685.

INCAPACITY:

- penal or religious, not recognized, 37, 502, 503.

INCESTUOUS MARRIAGES:

- not recognized as valid by English Courts, 675, 679, 681, 682.

INCOME TAX ACT, 1853...101, 164.

INCORPORATION OF FOREIGN LAW:

- in contracts, 62.

INDEMNITY. (See *Act of Indemnity*.)

INDEPENDENT PERSON:

- domicil of, 103 *et seq.*
- equivalent in many cases to person *sui juris*, 73.
- meaning of the term, 68, 73—75.

INDIA:

- bankruptcy in, 471, 472, 483.
- divorces in, 160, 421, 469, 845—847. (See *Divorce*.)
- domicil in, 160, 357. (See *Domicil*.)
- probates in, 384, 497.

INDIAN COUNCILS ACT, 1861...845, 846.

INDIAN DIVORCE ACT, 1869...419, 421, 469, 845.

INDIAN DIVORCES (VALIDITY) ACT, 1921...160, 421, 847.

INDIAN INSOLVENCY ACT, 1848...367, 471, 473, 477, 483.

INDIAN SUCCESSION ACT, 1865...160.

INDORSEMENT:

- of bills and notes, law governing form and effect of, 635. (See *Bills*.)

INFANTS. (See *Minors*.)

- aliens, when minors become, 202—204.
- capacity to contract, 581—583.

INFANTS—*continued*.

- "child," meaning of, 531.
- domicil of, 127, 136. (See *Domicil*.)
- guardian's rights over, in England, 517—519. (See *Guardianship*.)
- legitimacy of, 520. (See *Legitimacy*.)
- legitimation of, 521—533, 849—851. (See *Legitimation*.)
- nationality of, 169 *et seq.*, 176 *et seq.* (See *Parent*.)
- parents' rights over, in England, 514, 515.
- sailor or soldier, capacity to make will, 743.

INFERIOR COURTS JUDGMENTS EXTENSION ACT, 1882...429, 458.

INJUNCTION RESTRAINING PROCEEDINGS ABROAD:

- in administration action, 358, 377.
- in bankruptcy and winding-up, 368, 372.
- in divorce, 358.
- in other cases, 229, 355, 358, 361.

INSANE PERSON. (See *Lunatic*.)

INSOLVENCY. (See *Bankruptcy*.)

INSURANCE POLICY:

- English law governing assignment of, out of England, 566, 569, 596.
- proper law of, 592.

INSURERS:

- English, of goods on foreign ships, 607, 631.

INTENTION:

- contracts, in, 60—63, 572, 603.
- domicil, as affecting, 144.
- expressed, as determining "proper law of contract," 606, 607.
- general principle as affecting transactions, 60—64.
- inferred, as determining "proper law of contract," 607—609.
- presumed, as determining "proper law of contract," 609—615.
- "proper law of contract," as affecting, 572.

INTEREST:

- determined by "proper law of contract," 36, 654, 655.
- on money tortiously used abroad, 655.

INTER-MUNICIPAL LAW:

- use of the expression, 15.

INTERNATIONAL LAW:

- incorporated in municipal law in certain cases, 594.
- public and private compared, 13, 14, 15.
- rights under, not normally enforced in municipal Courts, 23.

INTERNATIONAL PRIVATE LAW:

use of the expression by Bar, 15.

INTERNMENT OF ENEMY ALIEN:

effect on right to sue, 810.

INTERPRETATION. (See *Construction*.)

INTERPRETATION ACT, 1889...187, 384, 497, 817.

INTESTACY, 337, 547, 716 *et seq.* (See *Succession*.)

INVALID:

domicil of, 153—156.

IRELAND (NORTHERN AND SOUTHERN):

enforcement of English bankruptcy in, 364 *et seq.*, 483 *et seq.*

enforcement of English judgments, &c. in, 362, 429, 458, 459.

enforcement of English lunacy orders in, 533, 534.

enforcement of English vesting orders in, 363.

enforcement of English winding-up in, 363.

enforcement of Irish judgments in England, 458, 459.

IRISH BANKRUPT AND INSOLVENT ACT, 1857...471, 481, 483.

IRISH BANKRUPTCY:

effect of, 471, 472, 483, 484.

IRISH LUNACY:

effect of, 533, 534.

IRISH PROBATE:

effect of, 495.

IRISH WINDING-UP PROCEEDINGS:

enforcement of, in England, 363.

ISLE OF MAN:

included in British Islands, 634.

not part of United Kingdom, 68.

separate country in law, 71, 81.

ITALIAN CODE:

Art. 6 of, quoted, 167, 507, 777.

Art. 7 of, quoted, 81, 777.

application of doctrine of the *renvoi* to, 777—779.

definition of "domicil" quoted, 791.

nationality as basis of divorce, 418, 423.

status dependent on nationality under, 19.

JACOBS:

his work on "Domicil" referred to as to—

minor's domicil, 106.

orphan's domicil, 131.

JAPANESE MARRIAGE:

validity of, as monogamous, 289.

JOHNSON, *IN RE*:

criticism of judgment in, 120, 716, 778—780.

JOURNAL DE DROIT INTERNATIONAL PRIVÉ:

quoted as to capacity to contract, 582.

JUDGMENTS:

“effective,” meaning of, 41—43.

final and conclusive, 448, 449, 450.

in personam, 446.

in rem, meaning and effect of, 283, 446, 564, 822.

JUDGMENTS ACT, 1838...272.

JUDGMENTS, ENGLISH:

extra-territorial effect in certain cases:—

bankruptcy, 363, 364—369, 371.

company winding-up, 363, 371—374.

lunacy, 363, 533, 534.

trusts, 363.

no extra-territorial effect generally, 362, 374.

under Administration of Justice Act, 1920...462—465.

under Judgments Extension Act, 1868...362, 429, 458—462.

JUDGMENTS EXTENSION ACT, 1868...362, 429, 442, 458—462.

JUDGMENTS, FOREIGN:

appeal, effects of pending, 448, 450.

assignment, effect of, as, 442, 443.

cannot authorise variation of English procedure, 761.

definition of, 386, 387.

effects of, generally, 429, 448—452.

final, and for definite sum, must be, 449.

fraud, effect of, on, 433—439.

in personam, effects of, 448—452.

actionable in England, 448.

when cause of action maintainable in England, 452—454.

defence to action in England, 455—457.

original cause of action not extinguished, 454, 455.

special extension to parts of United Kingdom, 458—462.

special extension to other British possessions, 462—465.

in rem, effects of,

admiralty decrees, 465—467, 822.

divorce decrees, 468.

immovables, as to, 469.

movables, as to, 465—467, 469.

succession to deceased persons, as to, 469, 470.

JUDGMENTS, FOREIGN—*continued.*

invalid,

as an assignment, 442, 443.

definition of, for purposes of this work, 429.

effects of, 441, 442.

invalidity, grounds of,

fraud by Court, 434, 435.

fraud by successful party, 433.

jurisdiction, want of, 429. (See *Jurisdiction.*)

natural justice, disregard of, 440, 441.

private international law, disregard of, 439, 440.

invalidity, no ground of,

Court not being "proper Court," 430—432.

mistake, 444—447.

Judgments Extension Act, 1868, effect of, 458—462.

jurisdiction, necessary for, 386—428. (See *Jurisdiction.*)

mistake does not affect validity of, 444—447.

even though on face of proceedings, 445.

whether of fact or law, 444.

penal, effect of. (See *Penal Laws.*)

presumption of validity of, 444.

satisfied judgment for plaintiff is good defence in England, 455—457.

unenforceable *directly* in England, 429.

United Kingdom, special extension of, in, 458—462.

validity of, general rule as to, 444.

JUDICATURE ACT, 1873...205, 307, 342, 382, 458, 495, 496.

JUDICATURE ACT (IRELAND), 1877...381, 458.

JUDICIAL FACTORS ACT, 1889...535.

JUDICIAL SEPARATION:

action for, 296—300.

its effect on domicil, 134, 135.

JURISDICTION:

(1.) GENERAL PRINCIPLES AS TO, 23—59.

anomalous cases based on:—

convenience, 58, 59.

domicil, 49, 52—55, 258—261, 401, 407, 408.

place of obligation, 55, 56, 262 *et seq.*, 265, 408.

possession of property, 56—58, 397, 408—410.

residence, 52—54, 55, 258—261, 401, 408, 464. (See *Residence.*)

capacity for effective judgment, effect of, 40—43.

consistency with paramount English law, effect of, 32—40.

"Court of competent jurisdiction," meaning of, 39.

fundamental question in cases involving foreign element,
1, 2.

JURISDICTION—*continued*.(I.) GENERAL PRINCIPLES AS TO—*continued*.

- kinds of jurisdiction, 45—50.
 - in personam*, in actions, 47 *et seq.*
 - in rem*, in actions, 45.
 - status and divorce, in actions as to, 46, 47.
 - succession, in actions as to, 47.
- meaning of term "jurisdiction," 213.
- objections to, 51, 52.
- staying action, as to, 355—361.
- territorial limits, effect of, 23—32, 398.
- voluntary submission, effect of, 44, 45.

(II.) ENGLISH COURTS, JURISDICTION OF, 212, 213, 215 *et seq.*

- (a) when jurisdiction does *not* exist, 215 *et seq.*
 - arrangement under Companies Acts, to enforce in colonies, 371, 372.
 - penal laws, to enforce foreign, 230.
 - persons, in respect of certain, 215—222.
 - alien enemy, 234.
 - ambassadors, 216 *et seq.*
 - ambassador's suite, 216.
 - foreign sovereigns, 215 *et seq.*
 - set-off, exception as regards, 221.
 - trading, exception as regards, 222.
 - voluntary submission, exception as regards, 220.
 - subject-matter, in respect of certain, 223 *et seq.*
 - title to foreign immovables, 223—225.
 - trespass to foreign immovables, 223—225.
- (b) when jurisdiction *does* exist, 233 *et seq.*
 - connection of jurisdiction and service of writ, 242, 251, 252, 276, 353.
 - in respect of what persons, 233—238.
 - alien enemies, 234, 811.
 - ambassadors and foreign sovereigns, 220—222.
 - persons by estoppel, 235—238, 272—275.
 - in respect of what subject-matter, 225—230, 238, 239.
 - in respect of what kinds of action, 240.
 - administration actions, 240, 339. (See *Administration*.)
 - admiralty actions *in rem*, 215, 240, 280—284, 815—822. (See *Admiralty*.)
 - bankruptcy proceedings, 240, 323. (See *Bankruptcy*.)
 - collisions at sea, 700—703, 819.
 - divorce proceedings, 240, 285—291. (See *Divorce*.)

JURISDICTION—*continued.*(II.) ENGLISH COURTS, JURISDICTION OF—*continued.*(b) when jurisdiction *does* exist—*continued.*

in respect of what kinds of action—*continued.*

in *personam*, actions, 48—50, 240, 241 *et seq.*

where defendant is in England, 48, 242, 243.

corporation may be, though office abroad,
243, 244.

where defendant is out of England, 49, 250
et seq., 813—815.

“relief” against, when domiciled in
England, 258—261.

where action concerns land in England, 254
—258, 813.

where contract is made in England or to be
governed by English law, 253, 254, 262
—265, 813, 814.

exception as to Scotland, 264, 813.

where contract, to be performed in England,
is broken, 264, 265, 813, 814.

exception as to Scotland or Ireland, 264,
813.

where firm carries on business in firm
name, 275—278, 815.

where injunction is asked for, 265—267, 814.

where mortgage of personal property is to be
enforced, 271, 272, 814.

where person out of England is necessary
party, 267—271, 814.

where tort is committed in England, 265,
814.

third party notices, 279. (See *Service of
Writ.*)

judicial separation proceedings, 296—300.

legitimacy proceedings, 240, 305. (See *Legiti-
macy.*)

nullity of marriage proceedings, 240, 300—305,
829—831. (See *Marriage.*)

restitution of conjugal rights proceedings, 296
—300.

succession proceedings, 240, 350—354. (See
Succession.)

winding-up proceedings, 240, 329—334. (See
Companies.)

(III.) FOREIGN COURTS, JURISDICTION OF, 213, 214.

(a) where jurisdiction *does not* exist, 388—391.

persons, in respect of, 388, 389.

subject-matter, in respect of, 389—391.

JURISDICTION—*continued*.(III.) FOREIGN COURTS, JURISDICTION OF—*continued*.(b) where jurisdiction *does* exist, 392.administration actions, 427. (See *Administration*.)bankruptcy proceedings, 472. (See *Bankruptcy*.)divorce proceedings, 416, 422. (See *Divorce*.)*in personam*, actions, 393—412.

where defendant is resident, 50, 393, 399—401.

where defendant is a subject, 50, 393, 401, 402.

where plaintiff submits, 50, 393, 400, 402—407.

where defendant voluntarily appears, 394, 402—404.

where defendant contracts to submit, 394, 404—407.

not where defendant is domiciled, 52—55, 401, 407.

not where defendant has property, 56—58, 408, 409.

not where defendant is present at time of obligation, 55, 56, 409, 410—412.

in rem, actions in, 57, 413—415.nullity of marriage proceedings, 424. (See *Marriage*.)

may depend on cause of nullity grant, 425.

succession proceedings, 427. (See *Succession*.)

variation of marriage settlement on divorce of parties, 686.

JURY:

alien cannot sit on, if challenged, 210.

JUSTINIAN'S CODE:

definition of "domicil" quoted, 790.

KAUFMAN v. GERSON:

discussion of case of, 36, 595, 784—786.

KEITH, A. BERRIEDALE:

his "Imperial Unity and the Dominions" referred to, 72, 174, 194, 208.

"Responsible Government in the Dominions" referred to, 473, 827, 846.

"Theory of State Succession" referred to, 23, 171, 184, 197.

"War Government in the Dominions" referred to, 174.

KEY INDUSTRY:

restrictions on alien interests in, 209.

LAND. (See *Immovables*.)

definition of, 336.

jurisdiction in matters affecting, 46, 223—225, 389—391, 694, 695.

law affecting rights in, 37, 527, 542 *et seq.*

marriage, effect of, on, 546, 553—556, 787.

perpetuation of testimony as to, 255.

LAND TRANSFER ACT, 1897:

- effect of, on personal representative, 335, 337, 547, 709.
- on title to English land, 391.
- only extends to England, 339, 382.

LANGUAGE:

- knowledge of English, as condition of naturalization, 185.
- substitution of other official language in dominions, 194.

LAW:

- choice of, rules as to, 498 *et seq.*
- meaning of, 3, 6.
- "territorial" and "extra-territorial" distinguished, 4, 5.

LAW, MARITIME:

- as affecting torts on high seas, 700, 701.
- same in Scotland as in England, 701.

LAW OF COUNTRY:

- different meanings of term in this work, 6, 79—82.
- doctrine of the *renvoi* and, 771—781.
- foreign country, when applied to, means whole law, 79, 81, 771—781.
- meaning of, doctrine of the *renvoi* in connection with, 771, 772.

LAW OF DOMICIL. (See also, *Lex domicilii*.)

- meaning of, in connection with succession, 81, 713, 717, 771 *et seq.*

LAW OF ENGLAND:

- meanings of, 6, 7.
- use of, in this work, 79—81.

LAW OF FLAG:

- affreightment contracts *prima facie* governed by, 621. (See *Affreightment*.)
- authority of shipmaster governed by, 625, 626.
- meaning of term, 621.
- question of application of, to cases of damage by collision, 700, 701, 702.

LEASEHOLDS:

- are immovables in private international law, 75, 76, 77, 530, 532.
- control of Scottish executor over, 496.
- in England, can legitimated child succeed to, 531, 532.
- personal property in English law, 75, 76, 77.

LEGACY:

- for masses, valid by English law, 725.
- material validity regulated by law of domicile, 692, 693, 723—725, 736, 739, 740.

LEGAL PROCEEDINGS AGAINST ENEMIES ACT, 1915...252.

LEGITIM:

restriction on freedom of disposition in Scottish law, 693.

LEGITIMACY:

essentials of, 520, 521.

jurisdiction as to declaration of, 191, 193, 305—307.

conditions giving rise to, 307—309.

legitimation, how far it constitutes, 521 *et seq.*, 849—851. (See *Legitimation.*)

polygamous marriages, effect of, as regards, 290, 532.

real property in England, as regards, 527—532, 787.

LEGITIMACY DECLARATION ACT, 1858...189, 193, 298, 305—311, 829.

LEGITIMATED CHILD:

domicil of, 106, 108, 109, 127, 128.

nationality of, 177, 183, 527.

LEGITIMATION:

English Courts, how far they recognize, 849, 850.

leaseholds in England, succession to, by legitimated persons, 531, 532, 787.

other modes of, than *per subsequens matrimonium*, 532, 533.

per subsequens matrimonium, when valid, 521, 522, 850, 851.

domicil of mother immaterial, 525.

law of father's domicil at child's birth and marriage must allow, 521—524, 850, 851.

nationality not affected by, 177, 183, 527.

place of birth and marriage immaterial, 525.

real property in England, succession to, by legitimated persons, 522, 527, 528, 787, 851.

devolution by will to legitimated persons, 530, 531, 787.

LEWIN, T.:

his work on "Trusts" quoted as to equitable jurisdiction as to foreign land, 226, 228.

LEX:

choice of, a fundamental question, 2, 498 *et seq.*

five heads of, 11, 77—79.

LEX DOMICILII:

definition of, 11, 69, 77, 81, 82.

effect of change of domicil on—

movable property of married persons, 689, 690, 691—693.

wills of British subjects, 725, 729.

wills of both British subjects and foreigners, 732—740.

wills exercising power of appointment, 750, 757.

how far it governs or affects the following matters:—

bankruptcy, effect of foreign, 474.

bankruptcy jurisdiction of English Court, 321.

LEX DOMICILII—continued.

- how far it governs or affects the following matters—*continued.*
 - capacity to assign movables, 560, 568. (See *Movables.*)
 - capacity to contract, 577. (See *Contracts.*)
 - capacity to marry, 661, 866. (See *Marriage.*)
 - distribution of movables of deceased, 80, 712—715.
 - form of assignation of movables, 568—570.
 - heir's right of recourse against movables, 872.
 - husband's authority in England, 514.
 - legitimation *per subsequens matrimonium*, 521.
 - marriages in uncivilised countries, 672.
 - married persons' rights as to property, 554, 685 *et seq.* (See *Marriage.*)
 - married persons' rights of maintenance, 693.
 - parent's authority in England, 514, 515.
 - parent's rights to maintenance, 515.
 - parent's rights over child's movables, 515, 516.
 - powers of appointment, exercise of, by will, 742 *et seq.*
 - Savigny's view as to proper law of debtor's contract, 602.
 - status of persons, 504—510.
 - succession to movables, 716—718.
 - validity of assignment of movables under, 568—570.
 - wills, interpretation of, 731.
 - validity of, 719. (See *Wills.*)
- meaning of, in reference to succession, 81, 82, 713, 717.

LEX DOMICILII ORIGINIS:

- validity of will of British subject made in form allowed by, 726—729.

LEX FORI:

- definition of, 11, 69, 78, 79, 82.
- how far it governs or affects the following matters:—
 - administration of movables, 706—708.
 - bona vacantia*, 717, 718.
 - debts, procedure in recovering, 565, 567.
 - limitation of actions as to immovables, 557—559.
 - limitation of actions as to movables, 761, 767.
 - priority of creditors in administration, 707.
 - procedure, all matters of, 274, 761, 764—766.
 - torts, 694. (See *Torts.*)

LEX LIGEANTIÆ, 11.*LEX LOCI ACTUS.* (See also, *Lex loci contractus.*)

- definition of, 11, 78.
- how far it governs or affects the following matters:—
 - bills of exchange, 635 *et seq.* (See *Bills of Exchange.*)
 - corporation transactions, 512.
 - marriages, validity of form of, 661. (See *Marriage.*)
 - through carriage contracts, 625.

LEX LOCI ACTUS—continued.

how far it governs or affects the following matters—*continued.*

torts, 694. (See *Torts.*)

will, validity of form of, 725, 729, 734. (See *Wills* (11.).)

LEX LOCI CELEBRATIONIS:

meaning and use of term as regards contracts, 788, 789, 858 *et seq.*

Story's theory as to law affecting rights of married persons, 690.
proper law of contract, 602, 862.

LEX LOCI CONTRACTUS. (See also, *Contracts* and *Lex loci actus.*)

ambiguity of the expression, 11, 77, 78, 787—789.

definition of, 69.

difficulty of determining what is, 584.

how far it governs or affects the following matters:—

bills of exchange, 635 *et seq.* (See *Bills of Exchange.*)

capacity in mercantile contracts, 580—583.

carriage contracts, 626.

discharge in bankruptcy, 848, 849.

form of contracts, 583—585.

as to immovables, 545.

as to marriage, 585, 661, 832, 833.

principal and agent's contracts, 656.

validity and interpretation of contracts, 609—612, 858—861.

preference of English Courts for, 787—789.

presumption generally in favour of, as "proper law of contract,"
609—612, 861, 862.

LEX LOCI DELICTI COMMISSI:

as affecting torts, 11, 694. (See *Torts.*)

LEX LOCI SOLUTIONIS:

definition of term, 11, 69, 78, 788, 789.

discharge in bankruptcy by, effect of, 478, 479.

Foote's theory as to its governing contracts, 859, 860, 862.

foreign jurists, their preference for, 788, 789.

invalidity of contract under, 597—599.

lex loci contractus, its relation to the, 787—789, 848, 849.

presumption, when in favour of, as "proper law of contract,"
609, 610, 611.

validity of form of contract sometimes governed by, 586—588, 686.

LEX SITUS. (See also, *Immovables.*)

acquisition of title to land by prescription governed by, 558.

decreasing influence of, 37, 786, 787.

examples of, 553—559, 787.

definition of term, 69, 78.

determines whether property is movable or immovable, 539.

heir's right of recourse governed by, 870—872.

LEX SITUS—continued.

- immovables, rights as to, generally governed by, 542, 543.
 - capacity to contract as to, governed by, 543, 544, 583, 855, 856.
 - contracts as to, how far governed by, 544—546, 553, 618, 851—855.
 - exceptional cases as to, not governed by, 544—546, 553—559, 787, 852—855.
- law of the *renvoi* and, 781.
- movables, assignment of, how far governed by, 561 *et seq.*, 570, 571.
 - contracts as to, when form governed by, 586. (See also, *Movables*.)
- presumption in favour of, as “proper law” as to immovables, 618.
- whether action with regard to foreign land governed by *lex fori*, 557—559.

LIBEL:

- in foreign country, action in respect of, 38, 695, 704.

LIEN:

- action to enforce, in respect of foreign land, 229.
- maritime, meaning of, 283, 822.

LIMITATION ACT, 1623...767.

LIMITATION OF ACTIONS:

- immovables, query if *lex fori* governs, 557—559.
- lex fori* generally governs, 63, 761, 767.
 - except where right itself is barred, 63, 763, 767.
- non-operation in case of ambassador, 221.
- operative against alien enemies, 811.
- prescription differs from, 63, 557, 558, 763.

LIMITATION OF LIABILITY FOR DAMAGE BY COLLISION:

- regulated by British statutes, 700—703.

LINDLEY (RT. HON. LORD):

- his work on “Companies” quoted as to foreign limited companies, 163, 329, 511, 512.

LIS ALIBI PENDENS. (See *Staying Action*.)

- Court’s jurisdiction to stay actions, arising from, 355.
 - mere pendency not sufficient for, 359.
- effect of, as regards staying actions, 355—361.

LOCAL LAW:

- contrasted with extra-territorial, 3 *et seq.*

LOCALITY:

- of property, 342—347. (See *Situs*.)

LORD CAMPBELL’S ACT, 1846:

- jurisdiction under, 288.

LORD KINGSDOWN'S ACT, 1861. (See *Wills Act*, 1861.)

LOSS OF BRITISH NATIONALITY, 197—205.

LOWNDES, R.:

his "Law of Marine Insurance" quoted as to general average, 629.

LUNACY:

judge in, who is, 533.

LUNACY ACT, 1890...363, 503, 533, 534, 536—538.

LUNATIC:

authority of foreign curator in England over, 520, 534—538.

as to his person, 534, 535.

as to his movables, 520, 535—538.

as to English immovables, 536.

Scottish and Irish curator in England over, 533, 534, 535.

committee can bring action for divorce of, 824.

domicil of, 152, 153.

foreign curator's power to sue in England, 535.

foreign curator usually recognized here, 535, 536.

MACLAREN, J. A.:

his "Court of Session Practice" quoted—

as to *forum non conveniens*, 358.

as to interest, 654.

as to jurisdiction, 57, 410.

as to legitimacy jurisdiction of Scottish Courts, 307.

MACILWRAITH, SIR M.:

quoted on "The Bourgoise Case," 82.

MAHOMEDAN:

marriage with, law regarding, 289, 685, 689, 840.

MAINTENANCE OF PARENTS AND CHILDREN OR WIFE:

liability for, depends on domicil, 515, 693.

MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT)

ACT, 1920...458.

MALAY STATES:

birth in, does not confer British nationality, 170.

MANDATED TERRITORIES:

inhabitants of, not British subjects, 170.

MARINE INSURANCE ACT, 1906...631.

MARITIME CONVENTIONS ACT, 1911...248, 280, 282, 284, 765, 819, 820.

MARITIME LAW:

as affecting torts on high seas, 700, 701.

MARITIME LIEN:

action *in rem* for enforcement, 822.

meaning of, 283.

MARRIAGE:

actions for nullity of. (See also, *Jurisdiction*.)

English Courts, jurisdiction of, as to, 300—305.

foreign Courts, jurisdiction of, as to, 424—426.

capacity for, 661, 663, 678 *et seq.*, 829 *et seq.*, 865, 866.

depends on law of domicile of parties, 661, 663, 678 *et seq.*,
829 *et seq.*

effect of *Ogden v. Ogden*, 865, 866.

lex loci, sometimes affected by (?), 677, 678, 866.

unaffected by Foreign Marriage Act, 1892...674.

consent of parents to, a question of form, 507, 664, 665, 831.

contractual theory of, 823, 824, 841, 842.

deceased husband's brother, effect of marriage with, 664, 676, 681.

deceased wife's, or own niece, effect of marriage with, 522, 680, 681.

deceased wife's sister, effect of marriage with, 573, 681.

definition of, 286, 289, 290.

effect on nationality, 184, 185, 196.

form of, 661 *et seq.*

at foreign embassies, 662, 667, 668.

at foreign factories, 668, 669.

extra-territorial privilege regarding, 662, 667, 668.

in Catholic or Mohammedan countries, 671, 672.

in lines of British armies abroad, 662, 672.

in uncivilised countries, 671, 672, 782, 783.

on board British ship, 72, 669, 670.

on board foreign ship, 669, 670.

under Foreign Marriage Act, 1892...302, 662, 672 *et seq.*

at British consulates, 673.

at British embassies, 673.

at official residence of "marriage officers," 673.

on man-of-war, 673.

where local form impossible, 662, 671, 672.

immovables of parties, how affected by,

as to English immovables, 553—556, 787.

as to foreign immovables, 546.

incapacities for, by law of one party's domicile, 683, 839.

not recognized by English law, 683, 684, 831.

incestuous, not recognized by English law, 675, 679, 681, 682.

invalidity of, grounds of, 675—678.

contravening Royal Marriage Act, 675—677.

incapacity by *lex loci* possibly, 677, 678.

judicial separation, action for, 296—300.

MARRIAGE—*continued*.

- movables of parties, how affected by, 685, 690.
 - effect of *De Nicols* cases as to, 690, 692.
 - where no marriage contract, *lex domicilii* governs, 690, 691.
 - where a marriage contract, it governs, 685—687.
- polygamous, effect of, 289, 290, 532, 839—841.
- prohibition from, in England, who affected by, 679—681.
 - motive for, sometimes important, 675, 676.
- restitution of conjugal rights, action for, 296—300.
- revocation of will by, sometimes, 120, 548, 736—740, 757.
- status theory of, 825, 843.
- uncivilised countries, marriage in, 671, 672, 782, 783.
- validity of, general rule as to, 7, 661, 678.
 - depends both on capacity and form, 663.
 - effect of Imperial Act of Parliament as to, 685.
 - unaffected by intention to evade *lex domicilii*, 665.
 - unaffected by irregularity of ceremony, 665.
- various theories of, 823—825.
- voidable or void, effect on wife's domicile, 139, 302, 303.
- voidable or void, effect on wife's nationality, 198.

MARRIAGE ACT (ROYAL), 1772:

- effect of, 675—677.

MARRIAGE (SCOTLAND) ACT, 1856...585, 666, 833.**MARRIAGE SETTLEMENT:**

- application to property subsequently acquired, 689.
- effect of, on property of parties, 546, 553—556, 685 *et seq.*, 787.
 - not varied by subsequent change of domicile, 689, 690.
- interpreted generally according to law of matrimonial domicile, 554, 687, 688.
 - occasionally by some other law, 61, 608, 688, 689.
- validity of form of, 587, 588, 686.
- variation of, by Courts on divorce of parties, 686.

MARRIED WOMAN. (See *Husband and Wife*.)**MARRIED WOMEN'S PROPERTY ACT, 1882...691.****MARRIED WOMEN'S PROPERTY (SCOTLAND) ACT, 1881...692.****MARRIED WOMEN'S PROPERTY (SCOTLAND) ACT, 1920:**

- effect of, 546, 553, 555, 692, 693.

MARSDEN:

- "Law of Collisions at Sea" cited, 700, 704.

MATERIAL VALIDITY OF EXERCISE OF POWERS OF APPOINTMENT, 758—760.**MATERIAL VALIDITY OF WILLS:**

- where domicile is not changed, 723—725.
- where domicile suffers change, 736, 739, 740.

MATRIMONIAL CAUSES ACT, 1857:

jurisdiction under, 296, 300, 841, 843.

MATRIMONIAL CAUSES ACT, 1859:

jurisdiction as to marriage settlements, 686.

MATRIMONIAL CAUSES ACT, 1884:

jurisdiction under, 296, 298.

MATRIMONIAL CAUSES ACT, 1907...303.

MATRIMONIAL CAUSES BILL, 1921:

criticism of, 835—838.

MATRIMONIAL CAUSES (DOMINIONS TROOPS) ACT, 1919...
827.

MATRIMONIAL DOMICIL:

definition of term, 554, 555, 690.

“intended domicile,” does it extend to? 554.

law of, governs movables of spouses, when, 690.

lex loci actus does not affect, 690.

subsequent change of domicile affects, 691—693.

marriage contracts construed according to law of, 553—556, 687,
688, 689.

MERCHANT SHIPPING ACT, 1854...702.

MERCHANT SHIPPING (AMENDMENT) ACT, 1862...701.

MERCHANT SHIPPING ACT, 1894...174, 191, 282, 284, 701, 702,
815, 817, 819, 820.MERCHANT SHIPPING (LIABILITY OF SHIPOWNERS) ACTS,
1898 AND 1900...701.

MERCHANT SHIPPING (SALVAGE) ACT, 1916...819.

MERCHANT SHIPPING (STEVEDORES AND TRIMMERS) ACT,
1911...821.

MINOR:

his “Conflict of Laws” quoted, 110, 654.

MINORS:

domicil of, 127, 137. (See *Domicil*.)

exercise of powers of appointment by, 743, 744.

guardians’ rights over, 517. (See *Guardianship*.)

nationality of, 195, 196, 200. (See *Nationality (British)*.)

parents’ rights over, 514. (See *Parents*.)

payment out of funds in Court to, 509.

restrictions on grant of administration to, 509.

status of, 500 *et seq.* (See *Status*.)

MIR-ANWARUDDIN:

case of, 289, 416, 500, 684, 839, 840.

MISTAKE:

as affecting validity of foreign judgments, 444—447. (See *Judgments, Foreign.*)

MONEY SUBSTITUTED FOR LAND, 541.

MONEYLENDERS ACT, 1900...765.

MOBILIA SEQUUNTUR PERSONAM. (See *Movables.*)

as regards grant of administration, 347.

as regards parent's rights over child's movables, 515, 516.

MORALITY:

refusal of English Courts to enforce rights contrary to, 34, 36, 594, 595, 784—786.

MORTGAGES:

of foreign land, jurisdiction of English Courts as to, 225, 227, 229.

of immovables, governed by *lex situs*. (See *Immovables.*)

of ships, law governing, 439, 568, 815, 816.

MORTMAIN ACTS, 512, 548.

MOTHER:

cannot transmit nationality to child born out of British dominions, 181, 182, 183.

illegitimate child takes domicile of, 106, 108, 128.

legitimacy of child not dependent on mother's domicile, 525.

posthumous child takes domicile of, 106, 108, 128.

power to alter child's domicile after death of husband, 127—130, 132—134.

MOVABLES:

administration of, governed by *lex fori*, 709. (See *Administration.*)

not in England at date of death, 378—381.

assignment of, good by *lex situs*, 561—565.

good by *lex domicilii*, 568—570.

possible exceptions, 570, 571.

non-tangible, 565—568. (See *Debts.*)

tangible, 561—565.

bankruptcy, effect on, 364, 366, 367, 471, 474. (See *Bankruptcy.*)

capacity to assign governed by *lex domicilii*, 560, 561.

choses in action, 75, 77.

contracts as to, 580, 586, 620. (See also, *Contracts.*)

debts, in nature of, 565—568.

definition of, 69.

distribution of residue of deceased's, 712—715. (See *Distribution of Assets.*)

English administrator's claim to, 378—381.

MOVABLES—*continued*.

- explanation of the term, 75—77.
- guardian's rights as to ward's, 517, 519, 520.
- judgments of foreign Court as regards, 465—467. (See *Judgments, Foreign*.)
- jurisdiction as to. (See *Jurisdiction*.)
- law generally determining what are, 539—541.
- lunatic's, right of curator as to, 535—538.
- marriage, its effect upon the parties', 685 *et seq*.
- mortgages of, jurisdiction as to, 271, 272.
- "non-tangible," meaning of, 565.
- parent's rights over child's, 515, 516. (See *Parent*.)
- personal estate, distinguished from, 75—77, 726, 729, 745, 746.
- power of appointment by will over, 740 *et seq*. (See *Power of Appointment*.)
- procedure in recovering non-tangible, 565, 567.
- situation of, what is, 342—347.
- succession to, rules as to, 376, 716, 730. (See *Succession*.)
- "tangible," meaning of, 561.
- uncivilised countries, law governing alienation in, 783.
- wills of, 719. (See *Wills*.)

NAME:

- restrictions on alien's change of, 210.

NATIONALITY (BRITISH):

- acquisition of, 169 *et seq.*, 799 *et seq*.
 - (a) by birth, rules as to, 169 *et seq.*, 799 *et seq*.
 - in British dominions, 169—175, 800, 801, 805.
 - by British descent, 176—183, 806—809.
 - (b) later than birth, 183 *et seq*.
 - annexation, 183, 184, 195.
 - persons not under disability, 183—190.
 - effect of naturalization, 190—192.
 - persons under disability, 195 *et seq*.
 - divorced women, 185.
 - married women, 184, 800.
 - widows, 185.
 - minors, 195, 196.
- Act of legislature of British Possession, acquisition by, 194.
- Act of Parliament, acquisition by special, 194, 195.
- application for declaration of, 306, 308.
- birth, acquisition by, 169—183.
 - non-acquisition, in spite of, 171—173.
- declaration of alienage, meaning of, 199—201, 204.
- definitions, relating to, 167.
- denization, effect of, as regards, 168.
- deprivation of, 192.

NATIONALITY (BRITISH)—*continued*.

- descent as basis of, 176, 809.
- disability, meaning of, 167.
- divorced women, their, 185.
- loss of, 197 *et seq.*
 - annexation, 197, 202.
 - declaration of alienage, 199—201, 204.
 - effect on domicile, 135.
 - marriage, 197, 198.
 - naturalization abroad, 198, 199.
- mandated territories, position of inhabitants of, 170.
- married women's, 184, 185, 196, 197, 203, 204, 205, 206.
- minors, 195, 196, 200, 201, 202, 203, 205, 206.
 - on expatriation of parent, 202, 203.
 - on naturalization of parents, 195, 196.
- naturalization, 185 *et seq.*, 195, 196, 201—204.
- posthumous children, 181, 182.
- renunciation of, 199—201, 204.
- resumption of, 205, 206.
- retention of, 204, 205.
- shipboard, by birth on, 72, 173—175.
- unity of, 50, 174.
- widows, 185, 186, 203.
- women, not inherited through, 181, 182.
- women, whose marriage is declared void, 198.

NATIONALITY. (See also, *Allegiance*.)

- distinction between, and domicile, 107—108.
 - foreign jurists', tendency to abolish, 107.
- divorce based on, 422, 423, 825.
- Imperial Conference, 1921, resolution as to, 176, 809.
- man may be alien without definite, 168, 199.
- personal law determined by, 19.
- woman without definite, 199.

NATIVE STATES OF INDIA:

- birth in, does not confer British nationality, 170.
- ruler of, entitled to privileges of sovereign, 171, 216.

NATURALIZATION:

- rules as to, as affecting nationality, 185 *et seq.* (See *Nationality*.)

NATURALIZATION ACT, 1870...167, 179, 186, 190, 191, 197, 206, 207.

NATURALIZED BRITISH SUBJECT:

- legal position of, 190, 191.
- nationality of child of, 176, 179.
- right to apply for declaration under Legitimacy Declaration Act, 1858...307, 310.
- wills of, forms available for, 191, 726, 727.

NECESSARIES:

admiralty jurisdiction as to, 821.

NEGOTIABLE INSTRUMENTS:

bill of exchange, rights on negotiation, 635.

when negotiable, 648.

characteristics of, 649—651.

bonâ fide holder for value has good title, 649, 650.

property passes by delivery, 650.

transferable by one *bonâ fide* holder to another, 650.

foreign, 648—654.

foreign administrator's right to, in England, 491.

how made negotiable, 648—654.

Act of Parliament, by, 648, 649, 651, 652.

mercantile custom, by, 648, 649, 651, 652.

NELSON, H.:

his "Leading Cases on Private International Law" quoted as to—
contracts, form of, 587.

mode of discharge of, 616.

"proper law of," 588, 618.

unlawful by *lex loci contractus*, 595, 596.

immovables, contracts relating to, 852.

interest, rate of, 654.

NEW ZEALAND:

divorce granted to deserted wives in, 827, 846.

NEXT OF KIN:

interpretation of, in English will, 532.

NON-FERROUS METAL INDUSTRY ACT, 1918...211.

NOTICE OF ASSIGNMENT:

law governing, 567, 568.

NOTICE OF DISHONOUR:

law governing, 642. (See *Bills of Exchange*.)

NULLITY OF MARRIAGE:

actions for decree of, 300—304, 424—426, 829—831. (See *Marriage and Jurisdiction*.)

effect on domicile of women, 139, 302, 303.

effect on nationality of women, 198.

grant of divorce arising out of foreign decree of, 294, 295, 826
et seq.

suggested extension of jurisdiction, 834, 835, 838.

OATH OF ALLEGIANCE:

taking of, essential for naturalization, 186, 194.

OBLIGATION. (See *Place of Obligation*.)

OFFICIAL:

domicil of, 156, 157.

ORIGINATING SUMMONS:

service of, out of England, 352.

PARENT:

authority over child's person in England, 514, 515.

law governing duty of maintaining, 515.

rights over child's movables in England, 515, 516.

PARLIAMENT, ACT OF. (See *Act*.)

PARTITION ACT, 1868:

proceeds of real estate sold under, treated as immovables, 552, 553.

PARTNERSHIP:

liability of partner for suit in respect of partnership debt, 764.

service of writ out of jurisdiction upon, 275—278.

when to be regarded as a corporation, 511.

PATENT:

alleged violation by foreign sovereign no ground for injunction,
217.

assignment of, law governing, 571.

PAWLEY BATE:

his "Notes on the Doctrine of *Renvoi*" quoted as to acceptance
of the *renvoi*-theory, 771—773.

PAYMENT:

as affected by rate of exchange, 659, 660.

out of funds in Court to foreign committee or curator, 520, 535,
536—538.

guardian, 519, 520.

minor, 509.

PENAL LAWS:

general effect of foreign, 37, 230—233, 453.

meaning of, 230.

restrictions on remarriage of divorced persons, not enforced in
England, 468, 469.

status as affected by foreign, 502, 503.

PENAL THEORY OF DIVORCE, 824, 825.

PERFORMANCE:

contracts as regards, 586, 597. (See also, *Contracts* and *Lex loci
solutionis*.)

PERSON:

- definition of, 67.
- "dependent," meaning of, 68, 73—75.
- explanation of term, 69.
- "independent," meaning of, 68, 73—75.
- sui juris* and not *sui juris*, 73, 74.

PERSONAL INJURY:

- admiralty jurisdiction as to, 819.

PERSONAL LAW:

- of Hindu or Mahomedan in India, distinguished from law of domicil, 839, 840.

PERSONAL PROPERTY OR ESTATE:

- administration of, in England, 339.
- alien's capacity to acquire, 207.
- control of lunatic's, 533, 534.
- movables not synonymous with, 75, 76, 77.
- power of appointment of, 744—760.
- used, inaccurately, as synonymous with movables, 77, 374, 717.
- wills of, under Wills Act, 1861...725—730, 732—740.

PERSONAL REPRESENTATIVE:

- definition of, 335, 337, 547, 709. (See also, *Administration*.)
- English administrator's claim to act as, in foreign country, 376, 377.
- foreign, title of, to English movables, 489—491.
- position of, as to debts, 490, 491.
- Land Transfer Act, 1897, effect of, on, 337, 339.
- property passing to, under English grant, 377—381.

PERSONAL UNION:

- nationality of subjects of kingdom in, with United Kingdom, 170, 197.

PETITION:

- service of, out of jurisdiction—
 - for restitution of conjugal rights, 298.
 - in bankruptcy, 322.
 - in winding-up, 332.

PHILLIMORE (SIR R.):

- his "International Law" quoted or criticised as to—
 - capacity to make a will, 735.
 - domicil, criteria of, 139.
 - definition of, 792, 793.
 - plurality of domicils, 99, 100.
 - residence, where not a test of, 149, 150.
 - method of treating "Conflict of Laws," 20.
 - status governed by *lex domicilii*, 504.
 - staying actions, 360.

PIGGOTT, SIR F. T.:

- his work on "Foreign Judgments" quoted or criticised as to—
 - "foreign judgments," definition of, 387.
 - extinguishing cause of action, 455.
 - foreign jurisdiction over immovables, 389, 390.
 - foreign rights, recognition of, 31.
 - penal laws, effect of foreign, 230.

PILLET:

- "Principes de Droit International Privé" cited as to—
 - choice of law, 498.
 - mode of treatment of private international law, 17.
 - relation of private international law to international law, 13.
 - rules of public order, 34.
 - validity of contract, as affected by its proper law, 588, 857.

PILOTAGE (COMPULSORY):

- effect of, on torts, 704. (See *Torts*.)

PLACE OF BREACH OF CONTRACT:

- jurisdiction based on, 264, 265.

PLACE OF MAKING OF CONTRACT:

- jurisdiction based on, 263; 264.

PLACE OF OBLIGATION:

- jurisdiction based on presence in, 55, 56, 262 *et seq.*, 265, 409.

PLEADING COMMISSIONERS, 1851:

- their report quoted, 48, 49.

PLEDGE:

- assignment of goods in, law governing, 562, 589.

POLYGAMY:

- as affecting validity of marriages, 289, 290, 532, 839—841.

POTHIER:

- his definition of "domicil" quoted, 791.

POSITIVE METHOD:

- of dealing with private international law, 19 *et seq.*

POSITIVE SCHOOL:

- of writers on private international law, 19 *et seq.*

POSSESSION OF FOREIGN LAND:

- action for, does not lie, 223, 224.

POST:

- termination of contract by letter abroad, 264.

POSTHUMOUS CHILD:

- domicil of origin of, 106, 108.
- incapable of inheriting British nationality, 181, 182, 183, 809.

POWER OF APPOINTMENT:

- exercise of, by will, 740—760. (See also, *Wills*.)
- attestation of, 752, 753.
- capacity for, 740, 743, 744.
 - where no testamentary capacity, 740, 743, 744.
- conflict of laws, connection with, 741, 742.
- distinction between, and making will, 742, 743, 744.
- form of, 744—753.
- general bequest, is good, in three cases, 754—758.
 - Wills Act, 1837, s. 27, under, 754—756.
- interpretation of, 754—758.
- material validity of, 758—760.
- operation of special, law of instrument creating governs, 758—760.
- special and general, 755, 758.
- when valid, 744—750, 752, 753.
 - need not be valid by law of domicile, 746.
 - by Wills Act, 1837...747.
- when invalid, 750—752.
 - exception, 752, 753.
- foreign instrument, created under, 759.
 - law governing exercise of, 758—760.
- Wills Act, 1861, and, 745, 747, 748, 856, 857.
- execution of will under, valid exercise of, 745.
 - reasons for this view, 747, 748.

POWER OF ATTORNEY:

- authority under, governed by what law, 656, 657.
- rights of parties under, governed by what law, 656, 657.

PREFERENCE SHARES:

- law governing rights attached to, 617.

PRESCRIPTION:

- difference between limitation of actions and, 557, 558.
- title to immovables by, 548, 558.

PRESENCE IN A COUNTRY:

- as basis of jurisdiction, 48, 241 *et seq.*, 393, 399, 400, 407, 408..

PRESENTMENT OF BILLS:

- law governing, 642. (See *Bills of Exchange*.)

PRESUMPTION OF LIFE LIMITATION (SCOTLAND) ACT,
1891...712.

PRINCIPAL ADMINISTRATOR:

- defined, 710.

PRINCIPLE OF EFFECTIVENESS:

- discussed, 40—43, 45 *et seq.*, 223, 399.

PRIORITY:

- in respect of mortgage, as depending on notice, 568.
- of creditors in administration, law governing, 693, 707.
- bankruptcy, law governing, 710, 711.

PRISONER:

- domicil of, 150.

PRIVATE INTERNATIONAL LAW:

- continental writers' method of dealing with, 16.
- definition of, 3, 5.
- general principles underlying, 23 *et seq.*
- invalidity of judgments disregarding principles of, 439, 440.
- methods of dealing with, 15—23.
- names used as synonymous with, 12—16.
 - "Conflict of Laws," 13.
 - "Comity," 15.
 - "International Private Law," 15.
 - "Intermunicipal Law," 15.
 - "Local Limits of Law," 15.
 - "Extra-territorial Effect of Law," 15.
- nature of the subject, 1—16.
- part of all civilized systems of law, 11, 12.
- positive method of treatment of, 16, 19 *et seq.*
- proper method of treatment of English, 20—23.
- schools of writers upon, 16—23.
- sources of English, 21—23.
- theoretical method of treatment of, 16 *et seq.*
- writers' methods of treatment of, 16—22.
 - Bar, 16.
 - Fœlix, 15, 19.
 - Holland, 3, 5, 11, 12, 14, 15.
 - Phillimore, 20.
 - Savigny, 16 *et seq.*
 - Schaeffner, 17.
 - Story, 17 *et seq.*
 - Wächter, 16.
 - Westlake, 13, 20.

PROBATE. (See under *Administration.*)**PROBATE ACT, 1857...342.****PROBATE DUTY, 346, 347.****PROBATES AND LETTERS OF ADMINISTRATION (IRELAND)
ACT, 1857...381, 391, 495.****PROCEDURE:**

- arrest a matter of, 763, 764.
- contracts unenforceable by English law of, 575—577.
- costs, security for, 762.

PROCEDURE—continued.

- counter-claim a matter of, 221, 222, 761, 768.
- definition of, 37, 38, 761—763.
- evidence a matter of, 761, 766, 767.
- foreign judgment not affected by irregularities of, 430—432.
- law generally governing is *lex fori*, 761, 764—766.
- limitation of actions a matter of, 761, 767.
- no person has vested interest in course of, 27.
- priorities a matter of, 693, 707, 710.
- rights regarding, not affected by foreign law, 37, 38.
- set-off a matter of, 221, 222, 761, 768.
- uncivilized countries, law governing, 784.

PRODIGAL:

- status of, not recognized in English law, 503.

PROMISSORY NOTE:

- definition of, 646.
- law governing is same as in bills, 647. (See *Bills of Exchange*.)
- exceptions to this rule, 648.

“PROPER LAW OF CONTRACT.” (See *Contract*.)

- criteria of, 572 *et seq.*
- immovables, as to, 545, 546, 553, 618—620.
- intention of parties as to, what is, 604—615.
- lex loci contractus* usually is, 609, 612.
- lex loci solutionis* sometimes is, 609, 610, 612.
- lex situs* is, *primâ facie*, as regards immovables, 545, 553, 618.
- liability under bill or note determined by, 646.

PROPERTY:

- administration of, in England, 377.
- defined and explained, 335, 336.
- jurisdiction based on possession of, 56—58, 397, 408—410.
- kinds of, 75—77.
- meanings of the term, 76.
- nature of, by what law governed, 539 *et seq.*
- situation of, 342—347.

PROTECTORATE, BRITISH:

- British nationality not acquired by birth within, 170, 806.
- recognition of probates granted in, 384.

PUBLIC INTERNATIONAL LAW:

- distinguished from present subject, 15.
- rights depending solely upon, how far recognized, 23.

PUBLIC ORDER:

- foreign Courts will not enforce rights against, 34.

PUBLIC POLICY:

- foreign judgments contrary to, 452—454.
- non-enforcement of contracts contrary to, 591, 594, 597, 784—786.
- restriction on marriage by law of domicile, 683, 684.
- will containing bequest contrary to, 719.

QUASI-CONTRACT:

action based on, not governed by rules as to torts, 703, 704.

RATE OF EXCHANGE:

damages for breach of contract or tort as affected by, 659, 660.

REAL PROPERTY:

alien's power to acquire, 207.

distinguished from "immovables," 75—77.

effect of legitimation as to English, 522, 527—532.

RECEIVER:

appointment of, not equivalent to winding-up order, 373.

RECONVEYANCE:

of foreign land, jurisdiction to order, 229.

RECOURSE:

heir's right of, law governing, 870—872.

REDEMPTION OF MORTGAGE:

of foreign land, 225, 229.

REDUCTION INTO POSSESSION:

of foreign property, effect on administrator's rights, 378, 489—491.

REFUGEE:

domicil of, 150—152.

RELEASE:

from obligations, law governing, 371, 477—485, 615—617, 847.

(See *Discharge*.)

RELIGIOUS VOWS:

incapacity arising from, not recognized in England, 302, 505.

REMARriage OF DIVORCED PERSONS:

when recognized, 468, 469.

REMEDY:

governed by *lex fori*, 761.

RENTCHARGE. (See also, *Charge*.)

position of, in private international law, 540.

RENVOI:

doctrine of the, 80—82, 771—781.

application of, in various cases, 776—781.

connection with jurisdiction, 775.

divorce, cases of, and, 422, 423, 780, 781.

guardianship, 520, 781.

law of a country and, 80—82, 771—781.

lex situs and, 552, 781.

succession, cases of, and, 552, 716, 776—780.

meaning of term, 777.

RESIDENCE. (See also, *Domicil, Home, and Presence.*)

- bankruptcy jurisdiction based on, 321, 322.

- corporations, what is their, 163, 348.

 - domicil of, same as, 163, 348.

- divorce jurisdiction, can it be based on, 285, 288, 420, 421, 836.

- domicil, distinct from, 101, 112, 259.

 - acquisition of, depends partly on, 145—147.

 - home, its connection with, 84 *et seq.*

- in British dominions, as condition of naturalization, 185, 186.

- in enemy country gives alien enemy character, 812.

- judicial separation and restitution jurisdiction, based on, 296—300.

- jurisdiction based on ordinary, 52, 54, 55, 258—261, 401, 408, 464.

- meaning of the term, 84.

- nullity of marriage jurisdiction, based on, 300—304.

- presumption of domicil from, 142—147.

RES JUDICATA. (See *Judgments, Foreign.*)

RESTITUTION:

- conjugal rights, of, 296—300.

RESTRAINING PROCEEDINGS ABROAD, 355, 358, 361, 368, 372.

RESTRAINT ON ANTICIPATION:

- under marriage settlement, 568, 686.

RESUMPTION OF BRITISH NATIONALITY, 205—207.

RETENTION OF BRITISH NATIONALITY:

- by child, 202, 203.

- by wife, 203, 204.

RETROSPECTIVE LAWS, 713, 769.

REVOCATION OF NATURALIZATION, 201, 203.

REVOCATION OF WILLS. (See *Wills.*)

REVOLUTIONARY MOVEMENT:

- invalidity of contract to support, 594.

REVENUE ACT:

- of foreign countries, contracts infringing, 35, 230, 597, 599, 600, 601.

REVENUE ACT, 1862...343, 345, 348.

REVENUE ACT (No. 2), 1864...343, 349.

REVENUE ACT, 1884...350.

REVENUE ACT, 1889...350.

RIGHTS:

- due acquisition of, what is the test of, 27—30.
- existence of, not governed by *lex fori*, 763, 768.
- nature of, how determined, 59, 60.
- under foreign law, recognized in England, 23 *et seq.*
 - distinction between recognition and enforcement, 31, 32.
 - enforced in England, 23, 31.
 - not enforceable in England in certain cases, 34—40.
 - contrary to English statutes, 34, 35, 573—575, 661, 672—677, 725 *et seq.*, 744 *et seq.*
 - contrary to public policy, 35—38.
 - as to land, 37, 389—391, 542 *et seq.*, 694, 695.
 - as to morality, 36, 230—234, 500—504, 593—595, 784—786.
 - as to procedure, 37, 761 *et seq.*
 - as to status, 37, 500—504.
 - as to torts, 37—38, 694 *et seq.*
 - interfering with foreign sovereigns, 39, 40.

ROMAN LAW:

- definition of “domicil” quoted from, 790.

ROSCOE, E. S.:

- on Admiralty jurisdiction, quoted, 280 *et seq.*, 815 *et seq.*

ROYAL MARRIAGE ACT, 1772:

- effect of, 29, 34, 573, 574, 675—677.

ROYAL NAVY:

- law affecting ships of, 72, 174, 215, 669, 670, 673.

RULE OF ROAD AT SEA:

- law governing, 701.

RULES OF SUPREME COURT, ENGLAND:

- Order I. r. 1, as to issue of writ, 242.
- Order II. r. 4, as to refusal of Court to permit issue of writ, 253.
- Order IX. r. 1, as to entry of appearance, 242.
- Order IX. r. 2, as to substituted service of writ, 250.
- Order IX. r. 8, as to service of writs on corporations, 163, 244, 245.
- Order IX. r. 8a, as to jurisdiction in respect of contracts made through agents, 246.
- Order XI. r. 1, as to service of writs out of England, 48, 49, 56, 72, 253, 254, 278, 813—815.
 - (a) where subject-matter is land in England, 49, 57, 254, 255, 813.
 - (b) where deed, &c. affects English land, 49, 57, 255—258, 813.
 - (c) where defendant is domiciled or ordinarily resident in England, 49, 222, 227, 258—261, 269, 272, 401, 813.

RULES OF SUPREME COURT, ENGLAND—continued.

Order XI. r. 1, as to service of writs out of England—*continued*.

(d) where trusts are to be executed under English law, 260, 261, 262, 813.

where property of deceased is to be administered, 262, 353, 813.

(e) where contract made in England, &c. is to be enforced, 50, 55, 56, 164, 250, 253, 260, 262—265, 405, 813, 814.

(ee) where tort is committed in England, 50, 55, 254, 265, 814.

(f) where injunction is sought or nuisance to be prevented, 49, 265—267, 814.

(g) where person out of England is necessary party, 50, 58, 59, 226, 227, 267—271, 814.

(h) where mortgage of personal property is to be enforced, 271, 272, 814.

Order XI. r. 2, as to jurisdiction in the case of persons domiciled or resident in Scotland or Ireland, 253, 814.

Order XI. r. 2a, as to jurisdiction by consent of parties to a contract, 237, 251, 272—275, 277, 408, 607, 815.

Order XI. r. 3, as to jurisdiction in probate actions, 242, 340.

Order XI. r. 6, as to service of notice of writ in lieu of writ, 251.

Order XI. r. 8a, as to service of petitions, &c. out of England, 238, 252.

in administration proceedings, 352.

in bankruptcy proceedings, 314, 322.

in winding-up proceedings, 332.

Order XVI. r. 48, as to third party notices, 58, 59, 279.

Order XLVI. r. 1, as to charging orders, 272.

Order XLVIIIa., as to actions against partnerships, 251, 252, 275—278, 815.

Order LV. rr. 3, 4, as to administration, 352, 714.

Order LXVIII. r. 1 (d), as to rules in divorce proceedings, 252.

Order LXXI., as to probate action, 339.

SAILOR:

domicil of, 158, 159.

SALE OF GOODS ACT, 1893...764, 765.**SALVAGE:**

admiralty jurisdiction as to, 819, 820.

allotment of shares of, law governing, 765, 820.

for saving life, 819, 820.

SAVIGNY:

his works quoted or criticized as to—

capacity to assign movables, 560.

“domicil,” definition of, 791, 792.

enforcement of vested rights, 33.

SAVIGNY—*continued*.

- his works quoted or criticized as to—*continued*.
- exception to rule of enforcement of vested rights, 34.
- homelessness, legal effect of, 89.
- interpretation of contracts, 602, 832.
- marriage, incapacity for, by law of wife's domicile, 683, 684.
- plurality of domicils, 99.
- status, its relation to domicile, 506.
- theoretical methods adopted by, 16 *et seq.*
- will, capacity to make, 735.

SCHAEFFNER:

- his works quoted or criticized as to—
- adoption by him of the theoretical method, 17.

SCOTLAND:

- bankruptcy in, effect of, 471, 472, 483, 484.
- enforcement of English bankruptcy in, 364 *et seq.*, 483—485.
 - judgments in, 362, 429, 458, 459.
 - lunacy orders in, 363, 534.
- enforcement of Scottish judgments in England, 458, 459.
- law of, how far applicable to British ships, 669, 670, 699.
- probate granted in England effective in, 382, 383.
- right of *curator bonis* in respect of property of minor or lunatic in England, 520, 534, 535, 536.
- when a "foreign country" for purpose of private international law, 71, 287.
- winding-up proceedings, order in, enforced in England and, 363.

SCOTTISH CONFIRMATION:

- effective in England, 495, 496.

SCOTTISH LAW:

- administration in bankruptcy, rules regarding, 708.
- approve and reprobate, doctrine of, 875, 876—878.
- arrestment *ad fundandam jurisdictionem*, 57, 403, 404, 409, 410, 459, 460, 461, 462.
- bills of exchange, operation of, as assignment of funds, 639.
- contract without consideration, if in writing, valid, 60, 593.
- decisions as to *situs* of property, 346.
- divorce jurisdiction, 420, 421, 824, 843—845.
- divorce, validity of foreign, 418.
- domicil, nature of, 115.
- forum non conveniens*, doctrine of, 358.
- husband and wife, property relations of, 691—693.
- interest, law governing, 654.
- judgments in British possessions, enforcement under, 462—465.
- jurisdiction, not based on domicile alone, 407.
- legitimacy, where marriage invalid, 521.
- Legitimacy Declaration Act, 1858...307.
- legitimation, *per subsequens matrimonium*, 521 *et seq.*, 849, 850.

SCOTTISH LAW—*continued*.

- lex loci contractus*, as determining capacity to contract, 580, 833.
- maritime law same as that of England, 701.
- marriage, form of, 661, 665, 669, 670.
 - Gretna Green, 665, 833.
 - material validity of, 677.
- Married Women's Property (Scotland) Act, 1920...546, 553, 555, 692, 693.
- nobile officium* of Court of Session, 555.
- procedure regulated by *lex fori*, 761.
- revenue laws of foreign countries, not recognized, 233, 453, 598.
- right of heir of immovables to recourse against movables, 870, 871.
- ship registered in Scotland, how governed, 669, 670, 699.
- suit against partnership or member, 764.
- whale fisheries, law regulating, 700.
- wills, form of, 729.
 - not revoked by marriage, 737, 739.
 - of land, form of, 875.

SEA. (See *High Seas*.)

SEAMEN:

- admiralty jurisdiction as to wages of, 822.

SECURITY FOR COSTS:

- alien, if resident, need not give, 234, 762.

SERVANT:

- domicil of, 160.

SERVICE OF WRIT:

- connection of, with jurisdiction, 242, 251, 252, 276, 353.
- in the jurisdiction, 241 *et seq.*
- out of the jurisdiction not generally allowed, 250 *et seq.*, 813—815.
 - exceptions, when allowed, 251 *et seq.*, 813—815.
 - acts, &c. affecting English land, 254—258, 813.
 - agreement to submit, 272—275, 815.
 - contracts made or performable in England, 262—265, 813, 814.
 - defendant domiciled in England, 258—261, 813.
 - defendant necessary party to English action, 267—271, 814.
 - English land is in dispute, 254, 255, 813.
 - injunctions and nuisances in England, 265—267, 815.
 - mortgages of personal property, 271, 272, 814.
 - partnerships in England, 275—278, 815.
 - torts committed in England, 265, 814.
 - trusts of English property, 261, 262, 813.
 - when defendant domiciled or resident in Scotland or Ireland, 253, 814.
 - when defendant is a foreign corporation, 511.

SET-OFF:

- governed by *lex fori*, 761, 768.
- in actions against—
 - alien enemies, 811.
 - ambassadors or sovereigns, 221, 222.
 - persons submitting to the jurisdiction of the Court, 235.

SETTLEMENTS:

- marriage, 546, 553—556, 685—690. (See *Marriage Settlements*.)

SHARES:

- of companies, locality of, 346.

SHAREHOLDERS:

- law regulating rights *inter se*, 512, 617.

SHERIFF COURT (SCOTLAND) ACT, 1876...382, 496.**SHIPS.** (See also, *Admiralty* and *Pilotage*.)

- admiralty jurisdiction as to, 815—822.
- carriage in, 621—631. (See *Affreightment*.)
- contract for employment of, law governing, 587.
- judgments *in rem* as to, 280—284, 822.
- law affecting, 72, 621, 622, 669, 670, 699, 700.
- marriages on board ship, 669, 670.
- mortgages of, 818.
- nationality of persons born on board, 173—175.
- situs* of British, 343.
- transfer of, law governing, at sea, 568.

SHIPS-OF-WAR:

- treated as part of country to which they belong, 72, 669, 670.

SHIPMASTER:

- law governing authority of, 625. (See *Affreightment*.)

SITUS:

- of bills of exchange, 344, 491.
- of bills of lading, 343, 349.
- of debts, 342—345, 348, 350, 491, 565, 568.
- of mortgages, 343, 345, 350.
- of movables, 342—347.
- of partnership business, 345.
- of shares, 346, 348.
- of trust estate, 346.

SLAVE TRADE ACTS:

- effect of, 573, 574.

SLAVERY:

- how far recognized in English law, 36, 502, 505, 591, 700, 786.

SOLDIER:

- domicil of, 158, 159.
- will of infant, 743.

SOVEREIGNS:

- authority, territorial limits of, 28.
- English jurisdiction over foreign, and their property, 215—217, 233, 234, 650.
- foreign jurisdiction over, 388, 389. (See *Jurisdiction*.)
- judicial notice of status of foreign, 215, 216.
- jurisdiction of, exists only so far as effective, 40—44.
 - over persons voluntarily submitting, 44 *et seq.*
- trust funds of foreign, English jurisdiction over, 239.

SPECIFIC PERFORMANCE:

- of contract affecting foreign land, jurisdiction to order, 225, 229.

STAMP ACT, 1815:

- necessity for taking out probate under, 338.

STAMPS:

- effect of absence of, 637, 768.
- exception in the case of foreign bills of exchange, 635, 637.

STATE:

- boundaries of, judicial notice of, 215.
- compared with "country," 71.
- definition of, 67.
- questions arising when composed of different countries, 159, 621, 622, 669, 670.

STATUS:

- adopted child, of, unknown in England, 37, 502, 503, 850.
- corporations, what is their, 511—513. (See *Corporations*.)
- domicil, its relation to, 504—510.
 - Savigny's view, 506.
 - the opposing theory, 507.
 - the compromise theory, 508.
- foreign status unknown to English law not recognized here, 37, 501, 502.
- lex domicilii*, its effect on, 504—510.
 - in transactions in place of domicil, 504, 505.
 - in transactions outside place of domicil, 505—510.
- meaning of, 500, 501.
- penal law as to, effect of foreign, 37, 502, 503.
- prodigal, of, unknown in England, 503.
- theory of divorce, 825.

STATUS OF ALIENS, 207—211, 310. (See also, *Alien*.)

STATUTE OF DISTRIBUTION:

- car legitimated children succeed to English leaseholds under, 22, 23, 531, 532.
- chattels real devolve under, on intestacy, 716.
- devolution of personal estate under, 3, 547.

STATUTE OF FRAUDS:

effect of, 546, 555, 556, 575.

is a matter governed by *lex fori*, 764, 765.

STAYING ACTION. (See *Lis Alibi Pendens* and *Restraining Proceedings Abroad*.)

Court's jurisdiction as to, 355—361.

arises on vexation and oppression, 355.

conflict of laws, relation to, 356.

vexatious and oppressive, what is, 355—361.

where same action in English and foreign Court, 358, 359.

STEPHEN'S "COMMENTARIES":

quoted as to British nationality, 173.

distinction between real and personal property, 76.

STIEBEL:

his "Company Law and Precedents", quoted, 329, 330, 331, 332, 373.

STORY:

his "Conflict of Laws" quoted or criticized as to—

administrator (foreign), his right to English goods, 490, 491, 492, 493.

animus manendi as regards domicil, 84.

capacity to contract, 577, 578.

capacity to make a will, 735.

Continental jurists, their method, 18.

contract, law governing, effect and validity of, 615, 832.

discharge of contracts, law governing, 615, 616.

"domicil," definition of, 97, 792, 793.

exercise of powers of appointment, 740.

immovables governed by *lex situs*, 542, 545.

immovables, law governing contracts as to, 545, 618, 852, 853.

interpretation of contracts, law governing, 602.

jurisdiction in actions *in rem*, 45, 413, 414.

over immovables, 390, 413.

marriage, its effect on movables, 690.

mercantile contracts, law governing capacity for, 581.

method of Story criticized by Bar, 17.

movables, law governing assignment of, 568 *et seq.*

movables, on death, law governing administration of, 709, 710.

"personal property," as understood by Story, 77, 717.

positive method adopted by Story, 19 *et seq.*

powers of appointment, law governing, 740.

property, law determining nature of, 542, 545.

succession to movables on intestacy, 716, 717.

views on *Pottinger v. Wightman*, 131.

his "Commentary on the Law of Bills of Exchange" quoted, 640.

his "Equity Jurisprudence" quoted as to election, 872.

STUDENT:

domicil of, 160.

SUBMISSION:

jurisdiction based upon, 44, 45, 220, 235—238, 273—275, 393, 399,
400, 402—407.
in bankruptcy, 326, 327.

SUBSTITUTED SERVICE OF WRIT, 250.

SUCCESSION. (See also, *Administration*.)

administration compared with, 53, 54, 335, 337, 338.
basis of jurisdiction as to, 53, 54.
definition of, 335, 337, 338.
different countries, to property in, 868, 869.
 devolution of whole estate, 869, 870.
 election, rules as to, 872—876.
 heir's right of recourse, 870—872.
doctrine of the *renvoi* in cases of, 776—780.
immovables, to, governed by *lex situs*, 547. (See *Immovables*.)
intestate, to movables, governed by *lex domicilii* at death, 716—
718, 730, 731.
judgment, foreign, as to, 469, 470, 720.
jurisdiction as to, depends on grant of administration, 350—354.
 of foreign Court, 427, 428.
movables, to, law governing, 53, 54, 719—721, 730.
polygamous marriages as affecting, 290.
rights of husband and wife as to, governed by law of domicil, 690—
693.
testamentary, 719 *et seq.*, 730. (See *Wills*.)

SUMMONS:

originating, service of, out of England, 352.

TECHNICAL TERMS:

in wills, how interpreted, 731, 732.

TERMS OF YEARS. (See *Leaseholds*.)TERRITORIAL BASIS OF NATIONALITY, 169—171, 175, 176, 799
—801, 805, 809.

TERRITORIAL JURISDICTION:

extent of, 238.

TERRITORIAL LAW:

meaning of, 4. (See *Law*.)

TERRITORIAL LIMITATION:

on sovereign powers of States, 28, 398, 601, 617.

TERRITORIAL WATERS:

exercise of jurisdiction over British, 281, 815.

nationality of person born on board ships in, 72, 173—175.

TERRITORIAL WATERS JURISDICTION ACT, 1878...815.

TESTATOR:

capacity of, governed by *lex domicilii* at death, 721, 722.

when change of domicil, 735, 736.

domicil of, at death governs all questions as to succession to movables, 719 *et seq.*

(See *Wills and Succession.*)

THELLUSSON ACT, 1800...552, 720, 723.

THEORETICAL METHOD:

of treating the "Conflict of Laws," 16 *et seq.*

THEORETICAL SCHOOL:

of writers on the "Conflict of Laws," 16 *et seq.* (See *Private International Law.*)

THIRD PARTIES:

validity of rights acquired by, under judgments obtained by fraud, 427, 442, 443.

THIRD PARTY NOTICE:

service of, out of the jurisdiction, 279.

TITLE:

to British immovables not cognizable by foreign Courts, 389—391.

to foreign immovables not cognizable by English Courts, 223—225.

TITLE DEEDS:

treated as immovables for certain purposes, 539, 540.

TITLES TO LAND CONSOLIDATION (SCOTLAND) ACT, 1868...
870, 875.

TORTS:

abroad, when actionable here, 38, 694 *et seq.*

action must lie *both* by *lex loci* and English law, 38, 694, 696, 697, 698.

actionable, need not be strictly, wrongful sufficient, 38, 698.

admiralty jurisdiction as to, in respect of goods carried on board ship, 818.

British nationality does not affect rule, 699.

foreign land, to, 223—225, 694, 695.

high seas, on, law governing, 699—701.

compulsory pilotage, 704.

limitation of liability, 700, 701.

indemnity, effect of foreign Act, 704, 705, 769.

jurisdiction as to, 38, 55, 265.

TORTS—*continued*.

- law governing foreign, 694 *et seq.*
- quasi*-contracts not governed by rules as to, 703.
- rate of interest on money or property tortiously enjoyed, 655.
- uncivilized countries, in, 31, 699, 783, 784.
- wrongful, various meanings of, in relation to, 695.

TOWAGE:

- admiralty jurisdiction as to, 820.

TRADE, CONTRACT IN RESTRAINT OF:

- invalid in England, 594.

TRADE DOMICIL IN WAR, 100, 146, 812.**TRADE MARK:**

- exclusive jurisdiction of English Court as to English, 239.
- service of notice on registered proprietor abroad, 238.

TRADE NAME:

- exclusive jurisdiction of English Court, 239.

TRADING WITH THE ENEMY ACTS, 211, 812.**TRANSFER.** (See *Assignment*.)**TRESPASS:**

- actions for, to foreign immovables in English Courts, 223—225,
694, 695.
- in foreign Courts, 389—391.

TRISTRAM & COOTE:

- their work on "Probate Practice" quoted, 339, 341.

TRUSTEE ACT, 1893...363.**TRUSTS:**

- jurisdiction *in personam* under, 261, 262.
- of foreign land, jurisdiction to enforce, 225, 229.
- situs* of trust estate, 346.

TRUSTS (SCOTLAND) ACT, 1921:

- jurisdiction as to trusts under, 261.

TUTORS. (See under *Guardians*.)**ULTRA VIRES:**

- action of foreign sovereign as, 28, 29.

UNCIVILIZED COUNTRIES:

- law governing acts, &c. in, 30, 31, 781—784.
- capacity for contracts in, 783.
- contracts in, 783.
- domicil in, 782.
- form of contracts in, 783.

UNCIVILIZED COUNTRIES—*continued.*

- law governing acts, &c. in—*continued.*
- marriages in, 671, 672, 685, 782, 783.
- movables, alienation of, in, 783.
- procedure as to transactions in, 784.
- torts in, 699, 783, 784.

UNDERWRITER:

- law governing policies entered into by, 607, 631.

UNION OF CROWNS:

- effect on nationality, 170, 197.

UNITED KINGDOM:

- definition of, 68, 639, 729.

UNITED STATES:

- revenue legislation of, not recognized in English Court, 601.

UNIVERSAL ASSIGNMENT. (See *Assignment.*)

UNREGISTERED COMPANY:

- jurisdiction to wind-up, 329, 330, 331, 332.

USE OF SHIPS:

- admiralty jurisdiction as to, 817, 818.

USURY, 36, 654, 655.

VALIDITY. (See *Contract, Power of Appointment, and Wills.*)

VALUABLE CONSIDERATION:

- under Bills of Exchange Act, 1882...633.

VARIATION OF MARRIAGE SETTLEMENT ON DIVORCE:

- by English or foreign Court, 686.

VATTEL:

- his "Droit des Gens" quoted as to definition of "domicil," 791.

VETO OF COLONIAL LEGISLATION, 681.

WÄCHTER:

- his works referred to as adopting the "theoretical" method, 16.

WAGERING CONTRACTS, 454, 465, 575, 576, 591.

WALES:

- part of England in private international law, 72, 817, 818.

WALKER & WILLIAMS:

- their work on "Administration" quoted as to—
- "administration," 339, 340, 341.
- executors de son tort*, 485.
- grant of administration, 339, 375.

WAR:

- legal position of alien enemy suitors during, 234.
- restrictions on change of nationality during, 198, 199.
- trade domicil during, 100, 146, 812.

WARRANT FOR ARREST:

- in an action *in rem*, 281.

WASTE:

- of property committed abroad, treated as *ex contractu*, 704.

WESTLAKE, J.:

- his "Private International Law" quoted or criticized as to—
 - administrator, foreign, his title to English goods, 489, 490.
 - administration governed by *lex fori*, 710.
 - bankruptcy, effect of English, 364, 366.
 - jurisdiction, 327.
 - Bills of Exchange Act, 1882, s. 72, sub-s. 3...639.
 - capacity to contract, 577, 580.
 - contract, the "proper law of," 588, 861, 862, 863.
 - contract, law affecting validity of, 832.
 - distribution of deceased's assets by the Court, 714.
 - domicil, change of, *in itinere*, 117, 118.
 - of origin, 104, 105.
 - particular place of, not necessary, 97.
 - effect of change of domicil on rights of married persons, 692.
 - essential validity of contract, law governing, 588, 861, 862, 863.
 - foreign judgments, 387, 429.
 - heir's right of recourse, 870, 871.
 - immovables, law governing contracts as to, 545, 852.
 - lex situs* as governing rights to, 542.
 - obligations as to foreign, 225.
 - "law of a country," meaning of, 771.
 - legitimated children, domicil of origin of, 109.
 - marriage, incapacity for, by *lex loci*, 677.
 - method of treating "Conflict of Laws," 20.
 - nationality, British, 167.
 - recourse, heir's right of, 870, 871.
 - Sottomayor v. De Barros*, his views as to, 684.
 - status, as to its relation to domicil, 507.
 - torts, liability of foreign ships for, 701, 702.
 - wife's separate domicil, 134.
 - wills, law governing validity of, 735, 736.
 - winding-up order, effect of English, 371.

WHALE FISHERIES:

- law governing, 700.

WHARTON:

- his "Conflict of Laws" cited as to—
 - capacity to make a will, 735.
 - domicil of lunatic, 152.

WHARTON—*continued*.

- his "Conflict of Laws" cited as to—*continued*.
- interpretation of law of the flag, 621, 622.
- validity of wills, 735.

WIDOW:

- domicil of, 138.
- nationality of, 185, 203.
- power to change domicil of child, 129 *et seq.*
- power to change nationality of child, 202, 203.

WILBERFORCE:

- his work on "Statute Law" quoted, 27.

WILLIAMS, R. V.:

- his "Law of Executors" quoted as to—
- meaning of "administrator," 338.
- "law of country," 7, 81.
- power of appointment and Wills Act, 1861...745, 747.
- succession to movables on intestacy, 716.

WILLIAMS, J.:

- on "Real Property" quoted, 76.

WILLIAMS & BRUCE:

- their work on "Jurisdiction in Admiralty Courts" quoted as to—
- admiralty claims, 815—822.
- admiralty jurisdiction, 280 *et seq.*, 815 *et seq.*
- salvage claims, 820.

WILLS. (See also, *Administration*.)

- (I.) of immovables, governed by *lex situs*, 542, 543, 547. (See *Immovables*.)
- revocation of, by marriage, 548, 736—746.
- (II.) of movables, 719 *et seq.*
- bequest for purpose contrary to English public policy, 719.
- British subjects, of, under Wills Act, 1861...35, 193, 208, 725—730, 732 *et seq.*
- naturalized, distinction as to, 191, 726, 727, 729.
- capacity, law governing, 720, 721, 722, 735.
- essential validity governed by law of the last domicil, 721, 723—725, 736.
- execution, valid by *lex domicilii* at date of, 732, 733.
- possible exception, 739, 740.
- valid by change of domicil, sometimes, 735, 736.
- where English domicil at death, 735, 736.
- where foreign domicil at death, 736.
- foreign property, as to, 870.
- form of, law governing, 721, 722, 723, 725—730, 732, 736, 747.
- interpretation of, law governing, 61, 731, 732, 734.
- exception, 732.

WILLS—*continued*.(II.) of movables—*continued*.

interpretation of word "child" in, 531.

invalidity, grounds of,

where change of domicile, 732, 735, 736.

where no change of domicile, 551, 721—725.

law of domicile at death usually governs, 719 *et seq.*

possible exception, 719.

power of appointment, exercise of, by, 740—760. (See *Power of Appointment*.)

probate of, grant of, 374. (See *Administration*.)

revocation of, by marriage, 120, 736—740, 757.

law of domicile at date of marriage determines, 736, 737.

validity of, law governing, 719 *et seq.*, 732 *et seq.*, 744 *et seq.*

legacy for masses, 725.

WILLS ACT, 1837...34, 35, 191, 193, 547, 548, 742, 743, 745, 746, 747, 750, 751 *et seq.*, 787.

WILLS ACT, 1861...21, 22, 34, 35, 193, 208, 721, 724, 725—730, 732—740, 774, 787, 856, 857.

WINDING-UP:

of companies, 329—334, 371—374. (See *Companies*.)

service of petition abroad, 332.

WRIT:

service of. (See *Service*.)

Illustrated by Alice's file